



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO. 142 OF 2021

KASAMABA ENTERPRISES LIMITED.....PLAINTIFF

- VERSUS -

EQUITY BANK (KENYA) LIMITED.....DEFENDANT

RULING

I. Preliminaries.

1. The Defendant herein filed a Notice of Preliminary Objection wishing to strike out the entire of the Plaintiff's suit dated 22nd July 2021 and the Notice of Motion Application dated 22nd July 2021.

II. The Defendant/Applicant's Case

2. The Objection by the Defendant/Applicant is on the ground that the issues raised in this suit herein are "*Res Judicata*" to three (3) other cases instituted and pending hearing and determination at different jurisdiction. These are namely:- **Mombasa Chief Magistrate's Court Civil Suit No. 773 of 2017, Mombasa Chief Magistrate's Court Civil Suit No. 579 of 2017 and Mombasa High Court Miscellaneous Application No. 232 of 2019 respectively.** The main gist of the Preliminary Objection deemed this court as lacking the jurisdiction to hear and determine the instant suit and application by virtue of the provisions of Section 7 of the Civil Procedure Act, Cap 21. It further held that the suit was an abuse of the court process ideally, the Defendant has urged that the Plaintiff ought to have preferred an appeal against the decision of the first instance court before this court as sitting as appellate organ as opposed to bringing this suit. Therefore the Defendant termed the suit was termed as being frivolous, misconceived, lacking merit and ought to be dismissed with costs.

III. Submissions

3. On 12th October 2021, while all parties were present in Court, the Honorable Court directed that the Notice of Preliminary Objection be canvassed by way of written submissions. Pursuant to that they all complied and on 16.11.2021 a ruling dated was reserved accordingly.

A. The Defendant/Applicants Written Submission.

4. On 26th October 2021, Learned Counsels for the Defendant the law firm of Messrs. Mukiri Global Advocates filed their written submissions in support of the filed Notice of Preliminary Objection. The Learned Counsel submitted that in the suit Mombasa CMCC 773 of 2017, the cause of action was related to the charged properties (L.R MOMBASA/MN/THATHINI/BLOCK 4/51, KILIFI/MTWAPA/1126, L.R 9504 (ORIGINAL NO 5800/14) SECTION I/MN, L.R 14633 (ORIGINAL NO 2474/20) SECTION I/MN) belonging to the Plaintiff. The charged properties were used to secure a sum of Kenya Shillings Eighteen Million Five Hundred Thousand (Kshs. 18,500,000/=) from the Defendant the Chargee. Eventually, the suit was settled by a Consent Judgement issued on 21st February 2019 where the Plaintiff was ordered to pay the Defendant a sum of Kenya Shillings Three Hundred Thousand (Kshs 300,000.00) on monthly installments in default the Defendant was at liberty to realize it from the charged property.

5. The Learned Counsel submitted that despite of the above, the Plaintiff the chargor defaulted. When the Defendant as the charge exercised its statutory power of sale as provided for in Law Under Section 96(1), (2) and (3) of the Land Act 2012, the Plaintiff rushed to court and filed another suit being Mombasa CMCC 579 of 2019. The Plaintiff sought orders stopping the sale of all that parcel known as Land Reference Number Mombasa/MN/Thathini/Block 4/51. On 17 April 2019 it was dismissed. The Honorable Court ruled that there was no case against the Defendant since the matter had been resolved in the suit CMCC 773 of 2017. The court reprimanded the Plaintiff for choosing to file a fresh suit instead of complying with the consent judgement entered in the previous suit. The entire suit was dismissed with costs for being res judicata to the case CMCC 773 of 2017. The Learned Counsel further submitted that, at the same time the Plaintiff also filed another application before the High court in HCMA 232 of 2019, seeking to restrain the Defendant from auctioning the property, Land

Reference Number Mombasa/ MN/Thathini/Block 4/51. The court marked the application as spent.

6. The Learned Counsel argued that the Plaintiff had abused the Court process by instituting this instant suit, notwithstanding the previous three court cases in an attempt to interfere with the Defendant's right to exercise its statutory power of sale. The Learned Counsel maintained that the Plaintiff was forum shopping expecting favorable orders from another court having failed to establish a claim against the Defendant from the previous suits. The matter was deemed "res judicata" by the Defendant as provided for by the dinx of Section 7 of the Civil Procedure Act, Cap. 21. They relied on the case of **IEBC - Versus - Maina Kiai & 5 others (2017)eKLR**.

The Learned Counsel contended that the Plaintiff had a chance in the previous cases to litigate any issue that substantially affected the subject suit proprieties. They argued that the Plaintiff was now precluded from approaching any other Court on determination on the same issues over the same subject matter and between the same parties. The Learned Counsel to support this point relied on the case of **A N M Versus P M N(2016)eKLR** where it was held that the court requires parties to a litigation, to bring forward their whole case and would not, except under special circumstances permit the same parties to open the same subject of litigation. The Learned Counsel argued that the doctrine of Res Judicata applied where a party raised issues in a subsequent suit which he ought to have raised in the previous suit as between the same parties. They urged court to allow the Preliminary Objection.

B. The Plaintiff's Written Submission.

7. On 18th November, 2021 the Learned Counsel for the Plaintiff the Law firm of Messrs. Hezron Gekonde & Company Advocates filed their written Submissions in opposition of the Notice of Preliminary Objection. The Learned Counsel maintained that in the suit CMCC 773 of 2017, the Applicant was never heard and no orders were sought against the Defendant. To them they contended that consent judgment cannot be said to be the basis of "res judicata" since the court never heard any evidence. The Learned Counsel further submitted that the present case sought for an account of the monies paid to the Defendant towards settlement of the loan. The Learned Counsel argued that the Defendant as a bank were termed as dishonest for being unwilling to declare the financial outstanding amount of the Plaintiff's account in relation to the loan facility. The Learned Counsel pleaded with court to find that the Defendant had a duty to furnish the Plaintiff with the full accounts of the loan facility account and dismiss the Preliminary Objection with costs.

IV. Analysis and Determination

8. I have fully considered all the issues raised by the parties, the filed pleadings and the written submission the cited authorities and the relevant Provisions of Law with regard to the Notice of the Preliminary Objection dated 22nd July 2021 by the Defendant herein. In order to arrive at an informed, just and fair decision, there are only three (3) issues before me for determination. These are

(a) *Whether the Preliminary Objection raised by the defendant meets the threshold of a Preliminary Objection in Law.*

(b) *Whether the entire suit ought to be dismissed for offending the Doctrine and principles of "Res Judicata" to the three (3) court cases CMCC 773 of 2017, CMCC 579 of 2017 and HCMA 232 of 2019 respectively file at different jurisdiction.*

(c) *Who meets the costs of the Preliminary Objection.*

ISSUE No. (a) Whether the Preliminary Objection meets the threshold of Law.

It is now well founded that the principle on Preliminary Objection was abundantly cleared in the famous case of **Mukisa Biscuits Manufacturing Co. Limited - Versus - West End Distributors Limited (1969) EA. 696**, where LAW J.A held:- on page 700 "***So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implications out of pleadings, and which if argued as a preliminary point may dispose of the suit.***" SIR CHARLES NEWBOLD P, on page 701 observed that "***The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.***"

The preliminary Objection is based on the Principle of Res Judicata under Section 791) of the Civil Procedure Act Cap 21 into the various cases filed at different jurisdictions. This is a pure matter of Law.

9. Based on this legal proposition and ratio therefore this Honorable Court is fully persuaded the Defendant has raised an appropriate issue within the threshold of a Preliminary Objection.

ISSUE No. (b) Whether the entire suit ought to be dismissed for offending the Doctrine and principles of "Res Judicata" to the three (3) court cases CMCC 773 of 2017, CMCC 579 of 2017 and HCMA 232 of 2019 respectively file at different jurisdiction.

10. The Defendant objects to the suit in it's entirety for being Res Judicata. Ideally, this Principle has been provided for by the Provisions of Under Section 7 of the Civil Procedure Act Cap. 21. *Inter alia:-*

“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.

From the above legal provisions, the following are the ingredients that constitutes and the bar of the Doctrine of *Res Judicata* to be effectively raised and upheld an account of a former suit, the following elements must all 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 this suit in which the issue is raised.*

11. It is trite law that “**Res judicata**” is a point of law and a true preliminary objection, if proven to exist a court ought to allow its procession and dismiss the entire suit. The **Court of Appeal in IEBC – Versus - Maina Kiai & 5 others (2017)eKLR** observed that:-

‘Res Judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. ...Thus for the bar of Res Judicata to be effectively raised and upheld on account of a former suit, the following elements must all 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 this suit in which the issue is raised.*

The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and afford parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by competent court. It is designed as a pragmatic and common sensual protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, y a multiplicity of suits and for a, to obtain at last outcomes favorable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of Res Judicata this rest in the public interest for swift, sure and certain justice.’

12. With respect to what res judicata entails, the requirement is that the issue raised in the later litigation should have been directly and

substantially in issue in the former one. In both cases of CMCC 597 of 2019 and HCMA 232 of 2019, the Plaintiff sought to restrain the Defendant from auctioning all that property known as Land Reference No. Mombasa/MN/Thathini/Block 4/51; while in the present suit, the Plaintiff is yet again seeking to restrain the Defendant from auctioning the same property Mombasa/MN/ Thathini/Block 4/51 together with another known as Land Reference No. Kilifi/Mtwapa/1126 as well as invalidation of the Notice of Sale dated 2nd June 2021. I am quite clear in my mind that the central issue in the suits CMCC 597 of 2019 and HCMA 232 of 2019, namely seeking injunctive orders to stop the sale of Mombasa/MN/Thathini/Block 4/51 is direct and substantial issue before this court, injunctive orders stopping the of Mombasa/MN/Thathini/Block 4/51 together with the property Kilifi/Mtwapa/1126.

13. This Honorable Court has observed and noted that the parties among the set of proceedings are the same and litigating under the same title. In all the three (3) previous cases, the Plaintiff has remained the same as well as the Defendant, save for the suit CMCC 773 of 2017 where the County Government of Mombasa has been included as the 1st Defendant. This has been replicated in this present suit where the same Plaintiff is suing the same Defendant under the same title.

The last issue for consideration for the doctrine of Res Judicata to be complete is whether the issues were heard and determined by a competent court that had jurisdiction over the subject matter and the parties. The consent Judgement that was entered into in the suit CMCC 773 of 2017 was a finality of the suit, borne from a consent order agreed upon by both parties. In the suit CMCC 579 of 2019, the suit was dismissed for being res judicata to CMCC 773 of 2017 and the Learned Magistrate held that In HCMA 232 of 2019 on the other hand was heard and determined. The legal import of consent Judgment is one bearing nor only contracted patterns to be set aside only if obtained by fraud, mistake or misrepresentation of facts but are final and binding in nature. I rely of the case of **“Flora Wasike –versus- Desmus Wambuko Case”** to support me on this issue I have noted that Chepkwony J in finding the application *“the Plaintiff instead of complying with the terms of the consent choose to file a fresh suit in court and therefore this instant suit is res judicata..”* as spent held that *“Upon perusal of the court record, I find that on 10th June 2019, this court allowed the application in terms of prayer (1) and (2), the application”*.

14. Equity and justice demands that litigation must sooner than later come to an end. The Plaintiff in my view is unnecessarily harassing the Defendant with multiple proceedings involving determination of the same issue. In **William Koross (Legal personal Representative of Elijah C.A. Koross) – Versus - Hezekiah Kiptoo Komen & 4 others [2015] eKLR the Court of Appeal** held that:-

‘The philosophy behind the principle of Res Judicata is that there has to be finality. Litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. a successful litigant must reap the fruits of this success and the unsuccessful one must learn to let go.

Most unfortunate this case appears to be a repudiation and negation of those salutary aims of the res judicata bar. The defendant and the persons he named in his counterclaim, all of them the respondents herein, were improperly and impermissibly allowed to re-litigate, re-agitate and re-canvass matters that were settled with finality by Scriven J. The judgement of the learned judge impugned in this appeal amounted to an impeachment of Scriven J’s judgement when the only lawful path by which the respondents could attain that aim would have been by appeal, which they did not pursue.’

15. The issues for determination in the suits instituted by the Plaintiff and those raised in the previous suits squarely fall within the purview of the doctrine of **Res Judicata**. While it is true enough that the prayers were different, however the common denominator between the suit and the cross – cutting suits was the issue of suit properties that were charged to the Defendant as collateral to secure a loan facility. The charges between the Plaintiff and the Defendant was the foundational question upon which the entire claim rested. The charges therefore were directly and substantially in issue in both the suits. The attempt by the Plaintiff to continue litigating should end in futility.

This is where litigation should come to an end. But unfortunately, the Plaintiff seems to have the desires and fervent energies to continue prolonging this case by introducing different aspects but of the same issue. Under the provisions of Section 7 of the Civil Procedure Act, Cap. 21 which is couched in mandatory terms and there is no way of going around it even by consent of the parties. I reiterate that the umpteenth time is that the Defendant has meritorious objection on the matters of pure law; litigation must come to an end.

V. Determination.

16. The upshot of all the above indepth analysis, I proceed to make the following findings. These are:-

a) **THAT the Notice of Preliminary Objection dated 17th August 2021 and filed on 14th September 2021 raised by the Defendant is merited and is hereby allowed.**

b) **THAT the entire suit instituted by the Plaintiff vide a Plaint dated 22nd July 2021 and the Notice of Motion dated 22nd July and filed the same day are and hereby dismissed and/or struck off.**

c) **THAT the costs of the Suit and application awarded to the Defendant/Applicant and to be borne by the Plaintiff.**

IT IS ORDERED ACCORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 25TH DAY OF JANUARY 2022

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

MOMBASA

In the presence of:-

M/s. Yumna the Court Assistant

No appearance for the Plaintiff/Respondent

Mr. Shehi Advocate for the Defendant/Respondent