



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL SUIT NO. 112 OF 2020**

**MARGARET WANJIKU HENRY ....PLAINTIFF**

**-VERSUS-**

**ROAD TOUCH SERVICES .....DEFENDANT**

**RULING**

(Application by defendant seeking orders to have the plaintiff's suit struck out; defendant claiming that the suit is res judicata, and is also an abuse of the court process as it is filed to circumvent orders issued in another previous suit; defendant also contending that the suit is time barred; in the suit, plaintiff seeking a declaration that she is entitled to half ownership of property held by defendant; defendant company said to be under proprietorship of the divorced husband of the plaintiff; plaintiff having earlier filed a matrimonial cause seeking a declaration for half shares of the defendant and the property held by it; suit dismissed for non-attendance; plaintiff applying to reinstate suit which was allowed on conditions that plaintiff deposits some money collected as rent from the suit land; plaintiff failing to abide by the said conditions but subsequently filing this suit; res judicata; apparent that orders or effect of orders sought in this case were similar to those in the matrimonial case; court of view that issues are the same and this suit is thus res judicata; apparent also that plaintiff abusing the court process by failing to abide by the court order requiring her to deposit the accumulated rent; suit struck out with costs)

1. The application before me is that dated 13 May 2021 filed by the defendant. The application is brought inter alia under the provisions of Order 2 Rule 15 (1 (a) and (d) of the Civil Procedure Rules, 2010. It seeks orders that the plaintiff's suit be dismissed with costs. The defendant principally cites three grounds being :-

- i. That this suit is misconceived, misplaced, frivolous, vexatious, incompetent and therefore an abuse of the process of court.
- ii. That the suit is res judicata the suit Mombasa High Court Matrimonial Cause No. 1 of 2008 (OS) Margaret Wanjiku Henry vs Peter Kiragu Njuguna, Roadtouch Services Limited and Fairmont Hotel Limited.
- iii. That the plaintiff's suit is time barred as 12 years have lapsed since the property in dispute, which is the land parcel LR No. Mombasa/Block XVII/734/MI, was transferred to the defendant.

2. The application is opposed by the plaintiff.

3. By way of background, the plaintiff instituted this suit through a plaint filed on 2 September 2020. She pleaded that she has a beneficial interest in the land known as L.R. Mombasa/Block/XVII/734/MI and the rental building standing thereon (hereinafter, 'the suit property'), which is registered in the name of the defendant. She further pleaded that the beneficial interest "arises from an equitable right created in the property through a constructive trust and/or resulting trust created out of outright investment by the plaintiff, implied conduct by parties herein and/or detrimental reliance to the plaintiff's detriment." The plaintiff further averred that she initially had possession of the suit property, but she was evicted by the tenant of the defendant. It is the case of the plaintiff that she was involved in the purchase of the suit land and paid the purchase price which was drawn from a joint account between her and one of the former directors of the defendant (actually her divorced husband). She pleaded that the defendant company never gave a single shilling towards the purchase price. She avers that the suit property was purchased as a joint business between her and her former husband, one Peter Kiragu Njuguna, and that she participated in the payment of the purchase price which was drawn from their joint account. She avers that the purchase price was acknowledged by the law firm of M/s Gikandi & Company Advocates as being from Mr. and Mrs. Peter Kiragu. She has contended that there is a constructive trust in that she participated in signing the sale agreement and that she was made to believe that she has a beneficial interest, and that, she invested both time and resources in developing it.

4. She has disclosed that there was the suit *Mombasa High Court Matrimonial Cause No. 1 of 2008 (O.S), Margaret Wanjiku Henry vs. Peter Kiragu Njuguna, Roadtouch Services Limited and Fairmount Hotel Limited* (hereinafter the 'Matrimonial cause'), but she has contended that her beneficial interest in the suit property stands well off, and is separate and distinct, from the matrimonial cause.

5. In this suit, she has asked for the following orders :-

- a. A declaration that there is a beneficial interest created in favour of the plaintiff in LR Mombasa/Block XVII/734/MI which is registered in the name of Road Touch Services Limited, the defendant.
- b. A declaration that LR Mombasa/Block XVII/734/MI is held in trust by Road Touch Services Limited the defendant for the benefit of both the defendant and plaintiff.
- c. Consequent to the grant of prayer (a) and (b) above, an order of partition at equal shares of LR Mombasa/Block XVII/734/MI to be directed at the Mombasa Land Registrar to register LR Mombasa/Block XVII/734/MI in the names of both the plaintiff and the defendant herein.
- d. The Deputy Registrar of this court be authorized where necessary to sign any documents required to ensure the transfers order under this judgment are realized, to that end the Land Registrar shall accept such documents signed by the Deputy Registrar as being sufficient to effect the transfer.
- e. A permanent injunction against the defendant by herself, her agents and/or appointed attorneys from any manner demolishing and/or selling and/or transferring LR Mombasa/Block XVII/734/MI and the rental building until the plaintiff's interest above is registered.
- f. Costs of the suit.

6. The defendant entered appearance and filed a preliminary objection claiming that the suit is *res judicata* and time barred. I heard the preliminary objection, which I dismissed, as I was not persuaded that the issues raised can properly be canvassed as a preliminary objection. I however gave liberty to the defendant to raise these issues through a substantive application, and it will be seen that through this application, the said issues have now been formally raised.

7. The supporting affidavit is sworn by Peter Kiragu Njuguna (Mr. Kiragu) and Antony Mwangi Njuguna (Mr. Mwangi). In his affidavit, Mr. Kiragu has deposed that the plaintiff does not hold any shares in the defendant company and neither does she have any interest in it whatsoever. He deposed that he petitioned for divorce in *Mombasa High Court Divorce Cause No. 2 of 2004*. The plaintiff then filed the suit *Mombasa High Court Matrimonial Suit No. 1 of 2008, Margaret Wanjiku Henry vs Peter Kiragu Njuguna, Road Touch Services Limited and Fairmont Hotel Limited*. He deposed that the divorce was granted in the year 2012 but the matrimonial cause was dismissed for non-attendance under Order 12 Rule 3 on 9 March 2017. He has averred that the matrimonial cause was subsequently reinstated on conditions, which the plaintiff never met, and on 21 March 2018, the court affirmed that the suit stands dismissed for failure to abide by the conditions. He has further raised issue that the plaintiff was found in contempt of orders of the court for failing to deposit a sum of Kshs. 42,473,395/= which the court had ordered the plaintiff to deposit following an audit of the accounts of the defendant. He has annexed a copy of the proceedings of the matrimonial cause. He has contended that the issues raised in this suit are similar to those raised in the matrimonial cause hence this suit is *res judicata*. He has averred that the defendant and the plaintiff were parties in the matrimonial cause; that the issues and the cause of action raised in this suit are the same as in the matrimonial cause; that the suit property in this suit is the same subject property in the matrimonial cause; that both suits raise issues of the alleged entitlement, to the title of, and possession of the defendant's businesses, and business premises on the suit property; that in paragraph 2 of the originating summons in the matrimonial cause, the plaintiff laid claim to half of the shares of her former husband (Mr. Kiragu); that in the supporting affidavit of the said originating summons the plaintiff deposed as follows, 'that despite the fact that I do not appear to hold any shares in Road touch Services Limited or Fairmont Hotel Limited, the said properties, businesses, motor vehicles and all the income and funds earned therefrom overtime, which exceed 200 million and I verily believe that the same is the joint property of myself and the 1<sup>st</sup> defendant to which I am entitled and also to a half share of whatever the defendant owns and to half portion of the proceeds of funds accrued from any business conducted thereon from their commencement until the determination of this suit.'

8. On the issue of limitation of action, it is deposed that there is a statutory maximum period of 12 years within which the plaintiff should have taken action. He deposed that going by the date of 30 November 1999 when the property was transferred to the defendant, more than 20 years have lapsed, and consequently, the plaintiff's claim is defeated for being out of time and this court lacks jurisdiction to hear this suit.

9. The affidavit of Mr. Mwangi, who is a director of the defendant, is more or less in line with what Mr. Kiragu has deposed above and I see no need of going through it, for it will merely be a repetition of the foregoing.

10. To oppose the motion, the plaintiff filed a replying affidavit. She has first asked that the affidavit of Mr. Kiragu be expunged for the reason that he is not a party to this suit and is thus a stranger. She deposed that the plea of limitation, *res judicata*, and gross abuse of the court process, were issues that had been ventilated through the preliminary objection. She deposed that this application became *res judicata* once the court struck out the preliminary objection and therefore, this application should also be struck out. She has averred that it is a trite principle of law that courts should strive to sustain, rather than, terminate suits. She believes that an attempt to determine the suit in a summary manner will be tantamount to making findings on a mini-trial within the context of an application, a procedure which she argues is not within the ambit of summary disposal of any application as envisaged in the Civil Procedure. She has reiterated that she has a beneficial interest in the suit property as pleaded in the plaint. On the issue of limitation, the plaintiff deposed that the suit is not time barred because the trusteeship exists by virtue of the existence of the title, and the only time the statute of limitation is operational is when the title to the property changes hands from the trustee.

11. On whether the suit is a gross abuse of the court process, the plaintiff deposed that the contempt as alleged has been purged by court through the dismissal of the matrimonial cause in its entirety and this contempt cannot be carried to the suit herein as to malign the plaintiff. The plaintiff urged the court to disregard the issue as extraneous and non-consequential to this suit as no contempt is being alleged in this suit and in fact the matrimonial cause is pending appeal. She annexed a Memorandum of Appeal to the Court of Appeal.

12. I directed parties to canvass the application by way of written submissions. I have taken note of the submissions filed by both counsel for the plaintiff and the defendant.

13. Mr. George Kariuki, learned counsel for the defendant, submitted on four issues. First is whether the suit is *res judicata*. He submitted that any matter which ought to have been made a ground of defence or attack in the former suit is deemed to have been a matter directly and substantially in issue in such suit. He submitted that as per the provisions of Section 7 of the Civil Procedure Act, the parties in this suit and the matrimonial cause are the same, secondly, that there are no new facts which the plaintiff has raised in the suit herein that were not already raised in the matrimonial cause, third, that in both cases, the plaintiff claims ownership of the same suit property.

14. On whether the suit amounts to gross abuse, is misconceived, misplaced, frivolous, vexatious and incompetent, counsel submitted that the plaintiff remains in contempt of the orders in the matrimonial cause. Counsel submitted that the plaintiff collected and spent Kshs. 42,473,395/- which amount was the property of the defendant, and which she was ordered to deposit in court (within the matrimonial cause) but failed to do so. He submitted that this suit is meant to defeat justice and that the plaintiff is using this suit to raise the same claims without the need to make the deposit of Kshs. 42, 473,395/-. He further submitted that the matrimonial cause was dismissed under Order 12 Rule 3 of the Civil Procedure Rules and that Order 12 Rule 6 disqualifies the plaintiff from filing a new suit over the same cause of action. He reiterated that this suit and the matrimonial cause are the same. He submitted that the pleadings of the plaintiff do not disclose or raise any reasonable cause of action with triable issues to warrant a full trial. Counsel submitted that the plaintiff's cause of action is pegged on ownership of the suit property. He submitted that the plaintiff relies on a sale agreement for the purchase of the suit property but she is not a party to that sale. He submitted that since she was not a party she can only raise a dispute against both buyer and seller and cannot be successful without the seller being a party. On the last issue, of whether the suit is time barred, counsel submitted that the suit property was registered in the name of the defendant on 30 November 1999, which makes it over 20 years, thus the suit is time barred under the provisions of Section 7 of the Limitation of Actions Act, Cap 22, Laws of Kenya.

15. For the plaintiff, Mr. Mwangunya, learned counsel, submitted that the court should take into account that the actual pleadings filed in this suit mentioned the existence of the matrimonial cause. He further submitted that this is a suit for an ordinary property claim and not a matrimonial cause. Counsel submitted that the prayers in the plaint are different from the prayers sought in the matrimonial cause. Counsel cited the case of *Maritha Bochare Obongo vs. Obongo Ogaro & 5 Others (2015) eKLR* and the case of *Paul James Savage vs. Les Belles Sauvages Limited (in liquidation) & another (2019) eKLR*.

16. Counsel referred to Section 7, Explanation 4 of the Civil Procedure Act. He submitted that the court in the matrimonial cause did not have jurisdiction to make such a determination at the time the dismissal of the suit was being made. Counsel submitted that division of matrimonial property upon dissolution of marriage is outside the purview or scope of this court and that this claim is a challenge to the title of listed properties, which claim for ownership cannot be ventilated in a matrimonial cause. He therefore submitted that such an issue could not have been made a ground of defence or attack. He referred to the case of *Damaris Kondoro vs Gachanja Gitere & Another, Nakuru HCCC No. 127 of 2004 (2005) eKLR* where the court found that *res judicata* cannot apply where the tribunal in the former suit had no jurisdiction. Counsel submitted that the suit is not *res judicata* because the cause of action herein is established through resulting trust and which cannot be ventilated in a matrimonial cause claim as it falls under an ordinary property claim. Counsel further submitted that the matrimonial cause was not heard and determined on its substantive merits as the matter never reached its conclusion. Counsel cited the case of *The Tee Gee Electrics and Plastic Company Ltd vs. Kenya Industrial Estate Ltd (2005) KLR 97* to support his submissions. Counsel further submitted that the claim sought in the matrimonial cause and this suit are materially different causes of action, founded on different reasons.

17. Without prejudice to the foregoing counsel submitted that *res judicata* is not an absolute bar to litigation. He relied on the case of *Pop-In (Kenya) Ltd & 3 Others vs. Habib Bank AG Zurich (1990) eKLR* and also the case of *Ali K Ahmed t/a Sky Club Restaurant vs. Kabbundu Holdings Ltd (2005) eKLR*. Counsel submitted a suit can be entertained under special circumstances, which he believed exist in this case, including that the matrimonial case was never heard on merits and that the claim is one which could not be ventilated in the matrimonial cause.

18. On the issue on whether the suit is time barred, counsel submitted that a trusteeship exists by virtue of the existence of the title. He submitted that the only time the statute of limitation would be operational is when the title to the suit property changes hands from the trustee and this has not been done. Counsel referred me to the case of *Stephen & 6 Others vs. Stephen & another (1987) eKLR*. Counsel submitted that the plaintiff has never been heard on the issues before court and cited the cases of *Kenya Railways vs. Namusu Enterprides Ltd & 3 others (2013) eKLR* and *MWK vs. AMW (2016) eKLR*. He submitted that the defendant has not provided any documents indicating that the defendant paid the purchase price of the suit property.

19. I have considered the application. Before I go to the merits of it, let be dispose of the preliminary point raised by the plaintiff, that this application itself is *res judicata*, considering that the defendant had raised the same issues in the preliminary objection that I alluded to earlier. On this argument, I see no substance. I was clear when I dismissed the preliminary objection that I have not determined the issues for I did not find them fit for determination through a preliminary objection. I indeed gave liberty to the defendant to revisit the issues by filing a formal application which has now been done. I therefore find that the application is properly before me and I will proceed to consider the same on merits.

20. There was also the issue that the affidavit of Mr. Kiragu needs to be expunged because he is not a party to this suit. That argument holds no water. I have seen an authority authorizing Mr. Kiragu to swear the affidavit that he swore, which authority was issued by the defendant. The defendant is at liberty to appoint any person it deems fit to swear an affidavit on its behalf. The affidavit of Mr. Kiragu is therefore properly on record.

21. On the merits of the application, the defendant contends that this suit is fit for dismissal and has raised three grounds. The first is that this suit is *res judicata*, the second is that the suit is an abuse of the process of court, and the third that this claim is out of time. I will deal with these issues as follows.

**Is the suit *res judicata* ?**

22. My first port of call has to be Section 7 of the Civil Procedure Act. It provides as follows:-

“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.”

23. Section 7 above reveals that for the claim of *res judicata* to be effectively raised and upheld, the following must be proved :-

i. That the issue raised in the subsequent suit was directly and substantially in issue in the former suit. In other words, it must be demonstrated that the two suits raise similar issues for determination.

ii. That the former suit was between the same parties or parties under whom they or any of them claim, or that those parties were litigating under the same title.

iii. The issue in question was heard and finally determined in the former suit.

iv. The competency of the court.

24. In our case, it has been raised that this suit is *res judicata* because of the case Mombasa High Court Matrimonial Suit No. 1 of 2008 (the matrimonial case). The pleadings and proceedings in that case have been provided and I have gone through them. The applicant in that case was the plaintiff herein and the respondents were three, being, Mr. Kiragu, Road Touch Services Limited (the defendant in this suit), and Fairmont Hotel Limited. That suit sought various declarations of ownership of various properties which the plaintiff must have thought formed matrimonial property for purposes of division. Prayer (2) and (15) in that suit asked for the following declarations :-

2. That it be declared that 1<sup>st</sup> defendant’s share of Plot Number Mombasa/Block XVII/734/MI, a leasehold property situated along Ronald Ngala Road within Mombasa together with the buildings thereon erected and registered in the name of Roadtouch Services Limited, the 2<sup>nd</sup> defendant, a limited liability company, in which the 1<sup>st</sup> defendant is the principal shareholder, is the joint property of the Plaintiff and the 1<sup>st</sup> defendant and that the Plaintiff is entitled to a half of such shares held by the 1<sup>st</sup> Defendant in Roadtouch Services Limited and to a half portion of all the proceeds, income or funds accrued from any business conducted thereon known as Fairmont Guest House comprising of a Guest House and rental shops, offices and Apartments held in diverse bank accounts since 1992 and especially Account No. 01\*\*\*\*\* (redacted) at XXXX Bank (redacted), Mombasa in the name of Fairmont Hotel Limited, the 3<sup>rd</sup> defendant.

(15) That it be declared that the plaintiff directly contributed both financially and in other ways and supported the 1<sup>st</sup> defendant in acquisition of the said properties and in running of the said businesses and that she is entitled to an equal share of the same.

25. In the former suit, the plaintiff claimed inter alia that she got married to Mr. Kiragu by way of customary law sometime in the year 1991 and that the defendant company was formed in that year after they had been married. She claimed that Mr. Kiragu assured her, and it was agreed, that he would ensure that his name was entered in the list of shareholders in due course but this was never to be. She averred that she was in the cereals business and was making good money and that she contributed equally to the acquisition of the properties. In respect of the suit property, she averred that she acquired it jointly with Mr. Kiragu and that Mr. Kiragu registered it in the name of the defendant company.

26. The matrimonial cause came up for hearing on 9 March 2017. The plaintiff did not attend and the same was dismissed for non-attendance under the provisions of Order 12 Rule 3. The plaintiff applied to reinstate the dismissed suit. That application was heard and ruling delivered on 4 August 2017 by Thande J. She did allow the reinstatement of the suit, but subject to the plaintiff depositing in court, within 60 days, all the rent received from the suit property from 6 September 2010 to the time of delivery of the ruling, in default of which the suit would stand dismissed. What happened is that the plaintiff deposited a sum of Kshs. 103, 500/= on 3 October 2017 which was thought not too little to constitute the rent covering all those years. The court then directed that a forensic audit of the collections be done and an audit firm was

appointed. The result of the audit report was that what was to be deposited was KShs. 42,473,395/=. The court held that since this amount had not been deposited, then the suit remained dismissed. This order was made on 21 March 2018.

27. It is instructive that the matrimonial suit was dismissed under Order 12 Rule 3, for under Order 12 Rule 6(2), where a suit is dismissed under Rule 3, no fresh suit may be brought in respect of the same cause of action. It follows therefore, that if at all this suit is found to be raising similar issues to those raised in the matrimonial case, then this court cannot entertain it for, in addition to offending Section 7 of the Civil Procedure Act, it will also offend Order 12 Rule 6 (2) of the Civil Procedure Rules.

28. It is of course the argument of the defendant that this suit raises similar issues to the ones raised in the matrimonial suit. The plaintiff does not think so. The argument of the plaintiff is that this suit seeks a determination of whether or not the suit property is held in trust and not whether it constitutes matrimonial property that should be subjected to a division. That may be correct, but I think for a true determination of whether or not an issue is *res judicata*, and was thus in issue in the previous suit, one needs to ask whether, if at all the plaintiff had succeeded in the previous suit, then he/she would still have needed to file another suit for reason that a material issue would not, and could not, have been determined in the previous suit and is yet to be determined. I say so because parties can couch prayers in different ways which may not be similar to the manner in which the previous pleading was drawn but the ultimate effect is the same. In the case of *E.T vs. Attorney General & Another (2012) eKLR* Majanja J had this to say regarding this point :-

“The courts must always be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.

29. I am in full agreement with the above dictum. Parties ought not to be allowed to twist their pleadings so as to avoid the *res judicata* rule when in fact, the substance of the suit has already been heard, or the issues raised are those which could have been raised in the former suit. That is why we have explanation No. 4 in Section 7 which provides that a matter which might and ought to have been made a ground of defence or attack in a former suit shall be deemed to also have been a matter directly and substantially in issue in the said suit.

30. In our case, my position is that if the plaintiff had succeeded in the matrimonial suit and had obtained the declaration that she owns half of the suit property, then she would not have found it necessary to file this suit, for she would already have accomplished the same result that she wishes to accomplish in this suit, and would have had determined, whether or not she is entitled to half of the suit property. It follows therefore, that what was in issue in the matrimonial cause is exactly what is in issue in this suit, that is the question whether, the plaintiff is entitled to a half share of the suit property. The matrimonial case was based on the argument that she contributed towards the purchase of the suit property in equal share with Mr. Kiragu. It is the same argument that she is presenting in this case. To me, it is immaterial that she has couched this case as one for the determination of a trust. In any event, nothing barred the plaintiff from raising the issue of the alleged trust in the matrimonial case. It could have been raised as a ground of attack and/or defence in that suit and is thus captured by explanation No. 4 of Section 7. My conclusion therefore is that the issues in the matrimonial case and those in this suit are similar and liable to be captured by the *res judicata* doctrine.

31. In any event, the plaintiff has stated that she has a pending appeal where she is contesting the dismissal of the matrimonial cause. I ask myself, what if that appeal succeeds and this suit is still pending, wouldn't there be a danger of two conflicting decisions being made on the same issue? Clearly, the two cases cannot be allowed to continue in the two separate courts because they raise similar issues and there is a risk of embarrassing the court process by having conflicting decisions as I have pointed out above.

32. Are the parties the same? The defendant and the plaintiff in this suit were parties in the matrimonial case. Granted, there were two other substantive parties and some interested parties (who comprised of the directors and shareholders of the defendant), who are not parties in this case, but to me, this is immaterial for our purposes. In the case of *Omondi v National Bank of Kenya Limited and Others [2001] EA 177* (cited in the case of *E.T vs Attorney General & Another*, supra) the court held that, “parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.” The issue in the matrimonial case addressed more than the suit property herein and it was thus necessary to have the other parties. So long as the parties in this suit were parties in the matrimonial cause, and the issue raised concerning the parties in the previous suit is also the same issue raised in this suit, then it must be considered that the provision in Section 7 that the parties be the same has been met.

33. Has the previous matter been determined? It was submitted by Mr. Mwangunya that the matrimonial cause had not been determined and cannot therefore be caught up by the *res judicata* rule and further that this constitutes a special circumstance which would entitle this court to hear the matter. It is true that the matrimonial cause was never heard on merits, but since the case was dismissed under Order 12 Rule 3, then, following the provisions of Order 12 Rule 6 (2), which I have already set out above, a subsequent suit is barred. This is given effect by Section 8 of the Civil Procedure Act which provides as follows :-

8. Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action.

The authorities raised by Mr. Mwangunya are all distinguishable. None concerned a subsequent suit filed after a previous suit had been dismissed under Order 12 Rule 3. There is good reason why we have the provisions of Order 12 Rule 6 (2) and Section 8 of the Civil Procedure Act otherwise a party would constantly be filing suits which he/she has no intention of prosecuting and continuously vexing the defendant. Given the above, I do not see how the plaintiff can shelter under the contention that the previous suit was not heard on merits.

34. What about the competency of the court? Mr. Mwangunya argued that the court handling the matrimonial cause could not have had jurisdiction to handle the suit herein and therefore the *res judicata* rule cannot apply. I see no substance in this argument. The High Court was competent in determining the issues that were before it in the matrimonial cause. The dispute therein related to division of matrimonial property and among the questions therein were whether the defendant company and the property that it held ought to be considered part of matrimonial property. That was a question which the court handling the matrimonial dispute had jurisdiction to determine together with the other issues raised in that matrimonial cause. Even if a question of trust had arisen, as it has arisen in this suit, that would not have precluded

the High Court from determining that matrimonial cause and it cannot be argued that one cannot introduce the element of trust in a matrimonial cause.

35. It will be seen from my analysis above, that I am of opinion that all boxes, on the issue of *res judicata* are ticked. My conclusion is that this suit is *res judicata* and must thus be dismissed.

**Is this suit an abuse of the court process ?**

36. The other issue raised is that this suit is an abuse of the process of court and it therefore ought to be dismissed. It has been submitted that the plaintiff has filed this suit in order to go round the order that required her to deposit Kshs. 42,473,3895/- in the matrimonial cause, and for that reason, this suit ought to be dismissed under Order 2 Rule 15 (b) and (d). I agree.

37. Order 2 Rule 15 is drawn as follows :-

15. Striking out pleadings [Order 2, rule 15.]

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- (a) it discloses no reasonable cause of action or defence in law; or
- (b) it is scandalous, frivolous or vexatious; or
- (c) it may prejudice, embarrass or delay the fair trial of the action; or
- (d) it is otherwise an abuse of the process of the court.

It will be seen from the above that the court has liberty to strike out a suit if it is satisfied of the matters set out in the rule. Thus, where it is apparent that a case has been filed in order to abuse the process of court, the court may proceed to strike it out.

38. In my opinion, allowing this suit would be allowing the plaintiff to engage in an abuse of the process of court and rubbish orders that have been made by another court in a previous suit. That ought not to be encouraged. Assuming that the amount that the plaintiff was supposed to deposit in order to set aside the order of dismissal of the matrimonial cause was the Kshs. 103,500/= which she had deposited in that suit, and her suit was reinstated, would she have come to court with this new suit ? I doubt. It is apparent to me that the plaintiff has filed this suit so as to circumvent the order that required her to account for the rent proceeds that she collected in the suit premises and to escape depositing it as a condition for her suit to be reinstated. I cannot permit the plaintiff to engage in such blatant abuse of the court process. This suit, is in my view an abuse of the process of court, and filed for purposes of avoiding compliance with an order of court, and for that reason, it is liable to be struck out. I am aware that the plaintiff argued that the contempt was purged when the suit was dismissed. This is not really an issue of contempt. It is a question of abuse of court process, where a party derives convenience by a failure to abide by an order of court, which ought not to be allowed.

39. Mr. Mwangunya submitted that the court ought to preserve suits and not dismiss them summarily. That may be so, but this cannot apply where it is clear that a suit has been filed for purposes of abusing the process of court, or is clear that it has been filed in violation of provisions of the law.

**Is the suit time barred ?**

40. The last issue raised is that the suit is time barred. If I had held that the suit is properly before court, then the issue of limitation would have been an issue that would have required evidence and I would not have been in a position to determine it with the material before me. I will not therefore dwell much on this point, which in any event, is not necessary, for reason that I have already found that this suit is liable to be dismissed on the grounds that it is *res judicata* and is also an abuse of the process of court.

41. For the above reasons, this application succeeds. The result is that this suit is hereby dismissed with costs.

42. Orders accordingly.

**DATED AND DELIVERED THIS 13<sup>TH</sup> DAY OF JANUARY, 2022**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**