



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND

AT MILIMANI

ELC NO. 1235 OF 2015

NICHOLAS WAHOME KIMONDO,

PETER MARERA GIKONYO & JANE WACHUKA MBUGUA

(Suing for and behalf of the BONDENI MAILI SABA JUA KALI ASSOCIATION).....PLAINTIFF

VERSUS

ABIGAEEL WAMBUI.....1ST DEFENDANT

PAULINE WAMUYU.....2ND DEFENDANT

MARGARET WANJUKU MAGU.....3RD DEFENDANT

NJIRU HOUSING DEVELOPMENT LIMITED.....4TH DEFENDANT

RULING

1. Before this Court for determination is the question of *res judicata* arising from a Preliminary Objection dated 28/04/2021 raised by the 4th Defendant. The 4th Defendant contends that the issues in this suit have been the subject of four previous court proceedings. He further contends that the same was dismissed by a lower court on 14/07/2015. He therefore prayed for the suit to be dismissed with costs to the 4th Defendant.

2. The Preliminary Objection was canvassed by way of written submissions. The parties filed their submissions and ruling date was reserved.

3. I have looked at the pleadings generally, the preliminary objection as raised and the rival submissions. I in turn have had time to analyze the emerging issues herein, which is whether *res judicata* applies to a matter that was dismissed for lack of both statutory and pecuniary jurisdiction.

4. Before I delve into the Preliminary Objections raised by the defendants, it is important that I establish if they meet the test laid down in the case of **Mukisa Biscuit Manufacturing Co Ltd .V. West End Distributors Ltd 1969 E.A 696** where Sir Charles Newbold said: -

“A Preliminary Objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the 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.”

5. In **Oraro .V. Mbaja 2005 eKLR**, Ojwang J (as he then was) described it as follows: -

“I think the principle is abundantly clear. A “Preliminary Objection” correctly understood, is now well identified as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

6. The above being the description of a Preliminary Objection, it is not in doubt that a Preliminary Objection raises a pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be

ascertained from elsewhere or if the court is called upon to exercise judicial discretion.

7. In determining a Preliminary Objection, the Court will also take into account that the Preliminary Objection must stem from the pleadings and raises pure point of law. In **Avtar Singh Bhamra & Another Vs Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, the Court held that: -

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

8. The 4th Defendant has in his Preliminary Objection averred that the suit herein is *Res judicata* as it relates to **Civil Suit No. 2984 of 2008**, which has already been decided in the interim stage. The Plaintiff’s in their submissions have disputed the fact that the suit herein is *Res judicata*. It is the Plaintiff’s further contention that the suit was dismissed for lack of statutory and pecuniary jurisdiction.

9. Now the Preliminary Objection raised by the 4th Defendant does raise a legal issue and which is that the plaintiff’s suit is *res judicata*. That is a pure point of law. The test laid down in the case of **Mukisa Biscuit Manufacturing Co Ltd (supra)** has been met.

10. I shall now consider the merits or otherwise of the 4th defendant’s Preliminary Objection.

11. The substantive law on this matter is **Section 7 of the Civil Procedure Act** which provides:

“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.”

12. In **Albert Magu Musa v Samuel Kagundu Muchira & 3 others [2017] eKLR**, Gitari J said:

“For the case to be res judicata three conditions must be shown. That is to say:-

i. That there is a former suit or proceeding in which the same parties in the subsequent suit litigated.

ii. The matter in issue is directly or substantially in issue in the subsequent suit.

iii. That a court of competent jurisdiction had heard the matter and finally decided the matter in controversy.”

13. In the case of **Caneland Ltd & Others .V. Delphis Bank Ltd C.A. Civil Appeal No 20 of 2000**, the Court held that for *res judicata* to apply, the issues must have been heard and decided on merits otherwise that plea cannot be sustained.

14. Similarly, in the case of **The Tee Gee Electrical & Plastic Co .V. Kenya Industrial Estates Ltd C.A Civil Appeal No 333 OF 2001 [2005 2KLR 97]**, the Court took the view that *res judicata* only applies where a matter has been heard and determined on the merits and not where the matter was disposed of by the Court due to want of jurisdiction.

15. I would agree with these latter views because **Section 7 of the Civil Procedure Act** which defines the principle of *res judicata* is explicit that before it can apply, the issues in the previous suit ought to have been ***“heard and finally decided.”*** Black’s Law Dictionary 10th Edition defines the terms *“heard and determined”* as follows: - ***“of a case, having been presented to a Court that rendered Judgment.”***

16. The term *“hearing”* is defined in the same dictionary as follows: -

“A judicial session is open to the public held for the purpose of deciding issues of fact or of law sometimes with witnesses testifying.”

17. *Res judicata* is also defined in the same dictionary as follows: -

“An issue that has been definitively settled by Judicial decision.”

18. A suit that has been dismissed or struck out for want of jurisdiction can hardly be said to have been *“heard and finally decided”* which is a requirement of **Section 7 of the Civil Procedure Act**. It would also not be in tandem with **Article 50(1) of the Constitution** which provides for fair hearing. The Court must also be alive to the requirements of both **Article 159(2)(d) of the Constitution** and **Section 19(1) of the Environment and Land Court Act** which eschew the determination of disputes on procedural technicalities. See **Wensley Barasa v Immaculate Awino Abongo & another [2020] eKLR**.

19. From a perusal of the Ruling delivered on 14/07/2015, it is apparent that the same was struck out for having been filed in a Court that lacked substantive and pecuniary jurisdiction.

20. Given that the matter has never proceeded for determination on its merits in any of the Courts that had previously dealt with the dispute, I

did not find any basis for the objection on grounds of *res judicata*. The Court therefore finds that Civil Suit No. 2984 of 2008 was not heard and determined on merits. It was determined on a procedural technicality.

21. Ultimately therefore and having considered the issues herein, I find that the current suit ELC No. 1235 of 2015 is not *res judicata* as Civil Suit No. 2984 of 2008 was not heard and determined on merits.

22. When all is considered, the Objection raised cannot be upheld and the same is hereby dismissed entirely with costs.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 10th Day of FEBRUARY 2022.

MOGENI J

JUDGE

IN THE PRESENCE OF:

Mr. Ingutia for the Plaintiff

No appearance for the Defendant

Vincent Owuor Court Assistant