



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC NO. 943 OF 2013

FIZZ HOTLES AND INVESTMENTS LTDPLAINTIFF/APPLICANT

VERSUS

THE KENYA NATIONAL HIGHWAY AUTHORITY.....1ST DEFENDANT/RESPONDENT

CHINA WU YI CO. LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

The 1st and 2nd Defendants filed a Notices of Preliminary Objection dated 14th and 23rd August 2013 respectively. Both Defendants aver that the issues canvassed in support of the Applicant's application are res judicata the same having directly and substantially been addressed in a matter between the same parties in HC Misc. Application No. 33/2013 wherein the Plaintiff's suit was dismissed on 3/7/2013.

The Preliminary Objections are in respect of the Plaintiff's application dated 1/8/2013 wherein the Plaintiff seeks injunction orders against the Defendants restraining them from proceeding with construction of the lower staircase of the footbridge adjacent L.R. No. 209/2389/3 situate along Muranga Road/Thika Super Highway. The application is premise on grounds that the Plaintiff stands to close its petrol station business as the lower staircase of the footbridge shall completely block access to it, thereby the Plaintiff stands to suffer irreparable loss and damage.

Counsel for the Plaintiff filed submissions dated 19/9/2013 in response to the preliminary objections. Counsel admitted that the Plaintiff did file a Judicial Review application seeking orders of prohibition directed to the 1st Defendant from constructing a footbridge on L.R. No. 209/2389/3. Counsel submitted that the court made a recommendation that the 1st Defendant does find a lasting solution to the Plaintiff's situation. It is counsel's submission that the Plaintiff has attempted to engage the 1st Defendant to an amicable solution in vain and hence the present suit.

Counsel refuted the claim that the issues raised by the Plaintiff are res judicata and/or an abuse of the court process. It was his submission that the prayers sought in the present application are not the same as those sought in the Judicial Review application. Further that the prayers sought herein were not available to the Applicant through a Judicial Review. Therefore, counsel submitted that the Court, vide

the Judicial Review application only had the mandate to look at the procedural aspects and not the merits of the case. Consequently, counsel submitted that the preliminary objections be dismissed.

Determination

The Plaintiff had on 5/2/2013 instituted a suit in the Judicial Review Division of the High Court wherein he sought an order of prohibition against the Defendants from further constructing a footbridge, arguing that the lower staircase will completely block access to his petrol station. The suit was heard to conclusion and the Court, W. Korir, J. delivered Judgment on 3/7/2013. The Defendants herein aver that the grounds in support of the present application were those in the Judicial Review application. Thus, in view of the said issues having been heard and adjudicated upon by the Court renders this suit *res judicata*.

This averment is disputed by the Plaintiff who argues that despite the parties and subject matter having been the same, the prayers sought are substantially different and that the jurisdiction of a Judicial Review Court is to deal with procedural aspects and not the merits of the case. The Plaintiff further avers that in the Judgment, the Court made a recommendation that the 1st Defendant herein does provide a lasting solution to the Plaintiff's situation.

The issue for determination is whether this suit is *res judicata*. I have read the Judgment delivered on 3/7/2013. In dismissing the application, the Judge stated:

".....Engineer Otieno Ogalo Oguta annexed a report by the City Planning Department titled: PLANNING ISSUES IN THE FACE OF ROAD UPGRADING: A CASE OF MURANGA ROAD EFFECTS ON ADJACENT PLOTS. At Pg. 19 and 20 of the report proposals are made in respect of certain properties. In respect of the Applicant's property, it is proposed that:-

9. Simba Petrol Station whose plot number is 209/2389/3 has also direct access to Murang'a Road, it has no acceleration and deceleration lane hence should be closed. Change of use is recommended.

The Respondent has cited this report to argue that the Applicant's access to Murang'a Road ought to have been blocked but it is only due to its magnanimity that it has allowed the applicant to continue operating the petrol station. The Respondent also indicated that the Applicant's property was not subject to acquisition and that the property could be accessed through Nyasi Lane. It is clear that although the footbridge is not constructed on the Applicant's land, it has blocked access to the plot. The Respondent should provide a solution to the Applicant's untenable situation. Although the application has not succeeded, the Respondent should find a lasting solution to the Applicant's predicament. Having said so, I find that this application has no merit and I dismiss it."

The law on *res judicata* is found in Section 7 of the Civil Procedure Act, which reads:

"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 can 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.

From the foregoing provision, for *res judicata* to be invoked in a matter, the issue in the present suit must have been decided by a competent court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title - See the case of **Karia and Another v the Attorney General and Others (2005) 1 EA 83.** It is not in contention that the parties and the subject matter of this suit is the same as that of the Judicial Review application. It is also evident that the grounds in support of this suit are those that were in the former suit. Undoubtedly therefore, this case is *res judicata*. The purpose of the doctrine of *res judicata* is to bring an end to litigation and a party should not be vexed twice over the same cause. See **Omondi v National Bank of Kenya Ltd and Others**

(2001) EA 177.

On the arguments brought forward by the Plaintiff that the prayers sought in the former suit are substantially different from the ones sought in this suit, further that the jurisdiction of a Judicial Review Court is purely on procedural aspects and not the merits of a case, it is my view that this is a misinterpretation of the law.

The effect of an order for prohibition and that of an injunction, in my view, is the same, that is, to stop an action. The former is applicable to decision making authorities from acting ultra vires or contrary to the rules of natural justice whereas the latter is to restrain unlawful acts which are threatened or being committed. I also hold the view that in reaching the Judgment delivered on 3/7/2013, the Court determined the application on its merits.

As regards the recommendation made by the Court in its Judgment, the Plaintiff avers that failure by the 1st Defendant from finding a lasting solution to the situation has forced it to file this suit. It is my finding that such a recommendation cannot be a basis for filing a fresh suit where the issues therein have already been heard and determined by a court of competent jurisdiction. It should not be lost that the Environment and Land Court is a court of concurrent jurisdiction with the various divisions of a High Court, including Judicial Review Division. Consequently, this Court cannot adjudicate over matters that a court of concurrent jurisdiction already did, for doing so will amount to it sitting on its own appeal.

In the circumstances, I allow the Preliminary Objections filed by the Defendants one dated 14/8/2013 and the other dated 23/8/2013.

Dated, Signed and delivered this 25th day of **February** 2014

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiff/Applicant

.....For the 1st Defendant

.....For the 2nd Defendant

..... Court Clerk

L.N. GACHERU

JUDGE