



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**ENVIRONMENT & LAND CASE NO. 177 OF 2013**

**MICHAEL KIMUTAI RONO & 2 OTHERS ..... PLAINTIFFS**

**VERSUS**

**CONSOLIDATED BANK OF KENYA LTD & OTHERS.....DEFENDANTS**

**RULING**

1. At the hearing of the applicant's notice of motion dated 19th December, 2013, a Preliminary Objection was taken on behalf of the first and second respondents on the grounds that the suit herein is res judicata. Mr Odhiambo for the first and second respondents argued that the plaintiff in this case had filed a similar suit vide originating summons in Eldoret Environment & Land case No. 265 of 2013 in which the parties herein were the same and were litigating over the same subject matter. Mr Odhiambo argued that the Eldoret case was heard and dismissed and that the plaintiffs herein filed the present suit without disclosing that they had filed a similar suit in Eldoret and that they had also even gone to the court of Appeal which had heard them on an application.

2. The Preliminary Objection was opposed by Mr Marube for the plaintiffs who argued that the parties in the Eldoret case are not the same as the case in Kitale. Mr Marube contended that he had filed an amended plaint in which there are six defendants whereas in the Eldoret case, there were three defendants. He also argued that in the Eldoret case, the same was disposed off by way of affidavits and that the plaintiffs in that case were seeking postponement of the sale. In the present case the plaintiffs are seeking declarations that the notices for sale which were issued were irregular.

3. Section 7 of the Civil Procedure Act 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.”***

4. Mr Marube appeared to suggest that the explanation in number 4 of section 7 of the Civil Procedure Act does not apply to this case. Explanation No. 4 provides as follows:-

***“Any matter which might and ought to have been made a 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.”***

5. The Plaintiffs in the present suit are seeking to fault the notices for sale of the properties which were issued by the bank prior to moving to start the process of sale. If the plaintiff's wanted to attack the notices, they were free to raise that ground in the former suit. Explanation number 4 of section 7 of the

Civil Procedure Act is therefore applicable to this suit.

6. There is no doubt that the plaintiffs herein filed this suit after the Eldoret case was dismissed and their move to the court of Appeal seeking injunction was dismissed. The plaintiffs did not disclose to the court that they had filed another suit in Eldoret involving the same parties and the same subject matter. The plaintiffs filed an amended plaint in which they brought on board three other defendants. This amended plaint was filed shortly before the preliminary objection was heard. This was only meant to show that parties in the former suit are not the same as in the present suit. This does not change the position in the two cases. The issues being raised now should have been raised in the former suit.

7. Mr Marube submitted that the filing of the originating summons in Eldoret was as a result of wrong advise from the plaintiff's former lawyers. This does not help his client's case. The issue here is whether this suit is res judicata or not. There is also an argument by Mr Marube that the Eldoret case was not heard by way of viva voce evidence. The manner in which a suit is determined does not matter whether it is determined by way of viva voce evidence or not is immaterial. What matters are the issues involved. In this case, I find that the issues herein were the same as in the previous suit. I therefore find that this suit is res judicata. The Preliminary Objection is upheld. The plaintiffs suit is hereby dismissed with costs to the defendants.

It is so ordered.

Dated, signed and delivered at Kitale on this 2nd day of April, 2014.

**E. OBAGA,**

**JUDGE**

In the presence of Mr Marube for the plaintiffs and Mr Akenga for Odhiambo for defendants.  
Court clerk – Kassachoon.

**E. OBAGA,**

**JUDGE**

**2/4/2014**