



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND AT NAIROBI**

**ELC CASE NO. 45 OF 2019**

**DHAMINI LIMITED..... PLAINTIFF**

**VERSUS**

**TANAD TRANSPORTERS LIMITED.....1<sup>ST</sup> DEFENDANT**

**MUSA HASSAN.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before this Court for determination is the question of *res judicata* arising from a Notice of Preliminary Objection dated 17/12/2021 raised by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants contend that the subject matter and the parties in this suit have been the subject of previous court proceedings in *Case No. 511 of 2008 Dhamini Limited vs Tanad Transporters & Musa Hassan*. They contend that the same was dismissed on 6/12/2018 for failure to comply with directions given under Order 17 of the Civil Procedure Rules 2010. They pray that the suit be dismissed with costs.

2. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants depone that *Case No. 511 of 2008 Dhamini Limited vs Tanad Transporters & Musa Hassan* was first dismissed on 23/3/2017 when the matter came up for hearing and there was no appearance. They allege that they Plaintiff brought an application to reinstate the suit which application was allowed on certain conditions. The Plaintiff failed to meet the set condition and so the suit was dismissed due to the default of compliance.

3. The Preliminary Objection was canvassed by way of written submissions. The parties were directed to file their submissions and a ruling date was reserved.

4. By the time of writing this Ruling, it is only the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who had filed their submissions. The submissions are dated 26/01/2022 and were filed in court on the even date.

5. I have considered the preliminary objection as raised and the submissions by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' counsel and I in turn have had time to analyze the emerging issue herein, which is whether *res judicata* applies to a matter that was dismissed for non-attendance.

6. Before I delve into the Preliminary Objection raised by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, it is important that I establish if it meets 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.”***

7. 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.”***

8. 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.

9. 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.”**

10. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have in their Preliminary Objection averred that the suit herein is *Res judicata* as it relates to **Case No. 511 of 2008**, which has already been decided in the interim stage. It is the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ contention that the suit was dismissed for non-attendance and/or default of compliance with court orders issued on 1/11/2021.

11. Now the Preliminary Objection raised by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants 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.

12. I shall now consider the merits or otherwise of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ Preliminary Objection.

13. 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.”**

14. 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.”**

15. There have been divergent views as to whether or not the dismissal of a suit for want of prosecution or non-attendance can amount to *res judicata*. In *Salem Ahmed Zaidi -vs- Faud Humeidan 1960 E.A 92*, the plaintiff’s case had been dismissed for non – attendance and a fresh suit was filed. The then East African Court of Appeal held that the latter suit was *res judicata* because an order dismissing a suit has the same effect as a dismissal upon evidence and accordingly, the first suit must be deemed to have been heard and determined and therefore, the dismissal of the earlier suit operated as *res judicata*. The Court of Appeal took the same view in *Thomas K. Sambu -vs- Paul K. Chepkwony 2018 eKLR* where it affirmed the reasoning in the case of *Salem Ahmed Zaidi (supra)* and said that the dismissal of a suit for non – attendance is in the nature of a final Judgment.

16. However, in the case of *Michael Bett Sibor .V. Jackson Koech C.A Civil Appeal No 83 OF 2016 [2019] eKLR*, the Court took a different view and held as follows: -

**“We accept that dismissal of a suit for non-attendance or for want of prosecution can amount to a Judgment, however, such a Judgment does not satisfy the requirements of Section 7 of the Civil Procedure Act as the issues raised in the suit has not been addressed and finally determined by the Court, but the Judgment is the result of what may be described as a technical knockout.”**

17. See also 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.

18. 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 10<sup>th</sup> Edition defines the terms “*heard and determined*” as follows: - “**of a case, having been presented to a Court that rendered Judgment.**”

19. 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.”**

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

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

21. A suit that has been dismissed or struck out for non-attendance of a party 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**.

22. Based on the above, the Court finds that **Case No. 511 of 2008 Dhamini Limited vs Tanad Transporters & Musa Hassan** was not heard and determined on merits. It was determined on a procedural technicality that is, dismissal for non-attendance. Upon the dismissal of a suit for want of prosecution, a party has two options. The first is to apply to the court without unreasonable delay to have the suit reinstated. The second option is to file a fresh suit but bearing in mind the limitation period within which to file the suit.

23. Ultimately therefore and having considered the issues herein, I agree and find that the current suit **ELC Case No. 45/2019** is not *res judicata* as **Case No. 511 of 2008** was not heard and determined on merits. The provisions above shows that the party can still file the suit afresh with leave of the Court if the suit is not time barred. Dismissal for want of prosecution does not amount to conclusive determination of the issue(s) in dispute and that is why the party whose suit is dismissed can reinstate it with leave of the Court or file a fresh suit.

24. 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 14<sup>TH</sup> DAY OF MARCH 2022.

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MOGENI J

JUDGE

IN THE PRESENCE OF:

MR. MURIUKI H/B FOR MR. OPONDO FOR THE PLAINTIFF

MR. WANJOHI FOR 1ST AND 2ND DEFENDANT

MR. VINCENT OWUOR COURT ASSISTANT