



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NUMBER 781 OF 2003

ANTHONY KABIMBA GUSINJILU & 112 OTHERS...RESPONDENTS/PLAINTIFFS

VERSUS

KENYA TRYPANOSOMIASIS RESEARCH INSTITUTE. DEFENDANTS

R U L I N G

The application which was before the court for determination of the Chamber Summons dated 16th December, 2009 and filed by the Defendant herein. It had sought a stay of any further proceedings of the decree of this court dated 10th July, 2009 and to set aside the said ex parte judgment/decreed dated 10th July, 2009.

To the above application the Plaintiffs raised a Preliminary Objection dated 31st July, 2013 in which they sought the striking out and/or dismissal of the said application on three grounds: -

- a. That this application dated 16th December, 2009 is res judicata another application filed by the same Defendant/Applicant and dated 2nd August, 2010.
- b. That the said application dated 16th December, 2009 should be dismissed under the principle of estoppel since the issues determined by this court (Waweru, J) under the application dated 2nd August, 2010 aforesaid are the same as those now sought to be determined under the application dated 16th December, 2009 aforesaid.
- c. That in any case the application dated 16th December, 2009 now before the court, is incompetent for being based on an affidavit sworn by an Administrative Officer of the Applicant/Defendant Company who had no legal authority to swear the affidavit.

I have carefully perused this file record. I observe that although the defendant's application before the court presently, was filed earlier on 16th December, 2009 before the application dated 2nd August, 2010, the latter application, due to a choice made by the Defendant, was heard and determined earlier in a Ruling by Waweru, J dated 16th May, 2013.

It is clear from the record that the prayers sought in the application dated 2nd August, 2010 and heard and determined by Waweru J, were and included: -

- i. *The review and/or the setting aside of the judgment and decree dated the 10th July, 2009.*
- ii. *That the entire suit as against the Defendant be struck out (on the grounds that it had abated as*

no legal representative had been joined)”.

This court observes that the court, (Waweru, J) considered both prayers above. As touching the prayer to set aside or review of the judgment dated 10th July, 2009, he stated as follows page 9: -

“... the partial consent judgment entered on 19th December, 2003 is still in place. The subsequent hearing before Sitati, J that resulted in the full judgment the Judge delivered on 10th July, 2009 was not irregular, and the judgment is good..

That being my view the matter, the Defendant Notice of Motion dated 2nd August, 2010 is misconceived and is without merit. It is hereby dismissed.....”

It is clear to this court, therefore, that that court (Waweru, J) dismissed the prayer in that application for ***“the setting aside or reviewing”*** of the judgment of Sitati, J of 10th July, 2009 based on the partial consent judgment of 19th December, 2003.

This court should now revert to the application by the Defendant of the Chamber Summons dated 16th December, 2009 which as stated earlier, is the application before this court and in respect of which this Preliminary Objection arose. It sought the following prayers: -

1.
2. That this court be pleased to stay any further proceedings consequential to the decree of this honourable court dated 10th July, 2009 pending the hearing and determination of this application.
3. That this Honourable Court be pleased to set aside the ex parte proceedings and the judgment/decree dated 10th July, 2009.
4.

The Defendants in this Preliminary Objection, urged this court to find that prayer (3) above is similar in all ways with the Plaintiff’s first prayer in their Notice of Motion dated 2nd August, 2010 which had sought that the court: -

“... be pleased to review and set aside its judgment/decree dated 10th July, 2009-“

That application was heard by this court. It was between the same parties as in this suit, and was dismissed on merit on the 10th July, 2009.

I have considered the first ground of this Preliminary Objection after taking account of what the Defendants said in defence through Mr. Mburugu who represented them. Mr. Mburugu argued that the Preliminary Objection is bad in law because it was presented by an affidavit. He also raised the issues of possible abatement of the suit and the entry of the disputed judgment when, as the Defendant thought, there was no plaintiff in existence. But a careful consideration of Mr. Mburugu’s submissions, will confirm that the Defendants were purporting to once more raise matters which were argued before Waweru, J and which were fully and finally determined by him by his Ruling cited herein above. On the other hand, the issues raised in the application are issues which could only be taken up on appeal to the Court of Appeal.

Reverting to the Preliminary Objection, it is clear from the comparison of the prayers in the application of 2nd August, 2010 determined by Waweru J, and those of the application of 16th December, 2009 now before me, that the prayer for the setting aside and/or reviewing of the judgment of 10th July, 2010, is in both applications. The issue having been considered and fully decided in the application of 2nd August, 2010, it should not be allowed to be again canvassed and determined by this court, as that would

be in breach of the principle of Res judicata. Any litigation has to come to an end and once a decision has been reached by a competent court, as was in this matter, it cannot be reopened, to be started all over again, unless the decision reached has been set aside. Any decision reached, if not set aside, can only be challenged on appeal and cannot be challenged in any inferior court, tribunal or in the same court except in the case of review. On that basis alone, the application dated 16th December, 2009 cannot be sustained and must be struck out and dismissed.

The Plaintiffs also sought to have the application dismissed on the principle of estoppel which operates in a similar way as that of Res Judicata. This court tends to agree with them and would dismiss the said application on this principle also.

Finally, the Plaintiffs also sought to have the same application struck out as incompetent because the supporting affidavit upon which it was grounded is bad for having been sworn by an officer of the Defendant who had no authority to swear it. I observe that the said affidavit was sworn by an Administrative Officer, and not a Director or Managing Director or Secretary as authorized by the Companies Act. I would also agree with the Plaintiffs in view of the fact that no other explanation as to how the deponent got authority was recorded.

For the above reasons, the Preliminary Objections raised by the Plaintiff/Decree Holders are valid and are hereby upheld. The Defendant's application by Chamber Summons dated 16th December, 2009 is hereby struck out and dismissed with costs to the Defendants. Orders accordingly.

Dated and delivered at Nairobi this 22nd day of September, 2014.

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D A ONYANCHA

JUDGE