



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL & LAND DIVISION

E L C NO. 701 OF 2012.

JAMES GICHURUPLAINTIFF

VERSUS

PHILIP KOMU WAHOME.....1ST DEFENDANT

HOMEWAY POULTRY FARM LTD.....2ND DEFENDANT

RULING:

The applicant herein **Philip Komu Wahome** has brought this Notice of motion dated 5/2/2013 brought under **Section 7 of the Civil Act and Order 2 Rules of the Civil Procedure Rules 2010** for orders that:

(a) *The Plaintiff filed and dated 12/10/2012 be struck out.*

(b) *For costs of the application.*

The application was premised on the grounds that, the Plaintiff and Suit are **res-judicata** having previously been filed in CMCC No. 1924 of 2010. That the Plaintiff's claim is expressly barred by statute. That the Plaintiff has not lodged an appeal against the decision of the Court in **CMCC No. 1924 of 2011** and therefore the Plaintiff and Suit is an abuse of the Court process.

The application was also supported by the annexed affidavit of **Philip Wahome Komu** . Applicant averred that the plaintiff herein has brought this suit against the applicant seeking injunctive orders. He further averred that the plaintiff herein had filed a similar suit at Milimani Commercial Court which was against the applicant herein and it related to the same suit property and sought similar prayers. That the said suit was dismissed for having abated. Applicant contended that the issues herein are identical and similar to the suit earlier filed at the Lower Court and so this suit is **res judicata**. Suit No. 1924 was dismissed for want of service of summons to Enter Appearance.

He further alleged that the said suit brought a closure on the litigation of the same issues on the suit property and it was not open to the plaintiff to bring a fresh suit based on the same facts. Applicant therefore urged the Court to strike out the Plaintiff with costs.

The Plaintiff / Respondent opposed the application. He confirmed that indeed he instructed **Messrs Wachakana & Co. Advocates** to file suit **No. CMCC No1924 of 2011**. The Plaintiff was duly served on the 1st defendant but summons were never taken out as a result, the suit was dismissed for having abated. The Respondent contended that the act of not taking out the summons was not his fault but fault of his

advocate and he should not bear the consequences. He also submitted that if the suit is struck out, that would be miscarriage of justice and contrary to the constitution.

He further contended that the Lower Court has no jurisdiction over the environment and land case and thus the filing of this fresh suit. Respondent prayed to Court to dismiss the Applicant/ Defendant Notice of Motion dated 5/2/2013.

The parties canvassed the application orally. I have now considered the instant application, the annexures therein and the relevant law. There is no doubt that in the year 2011, the plaintiff herein **James Gichuru** filed **CMCC No. 1974 /2011** at Milimani Commercial Court. Among the orders sought was prayer No.3 for injunctive orders against any dealing on Plot No. 154 Land Reference No. 10389 Nairobi. There is also no doubt that the said suit was dismissed for having abated for want of taking out summons to Enter Appearance.

There is also no doubt on 12/10/2012; the Plaintiff filed this suit against the 1st Defendant herein. The 1st Defendant is the same defendant who had been sued in CMCC No. 1924/2011. The plaintiff herein has sought for various orders in the instant suit.

Among the orders sought is a prayer for permanent injunction and eviction order against the 1st Defendant. What is clear therefore is that the parties in CMCC 1924/2011 and this suit are the same. The prayers sought are the same.

The question for determination is whether the suit herein is **res-judicata** in Section 7 of the civil procedure Act states

*“ No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly or substantially in issue in a former suit between the same parties or between parties under whom they or any of their claims, 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”.*

The issues in this case and CMCC No 1924 are similar. However, in CMCC 1924/2011, the suit was dismissed on a preliminary stage. The suit was not heard and decided on merit.

In the case of **Keharchand vs Janmohammed (1919-1920) EACA 64** it was held that where a suit has been dismissed on a preliminary point, the plaintiff has not had an opportunity of being heard on the merits and is therefore not res-judicata .

In CMCC 1924, the suit was dismissed on a preliminary objection. The plaintiff therein was not heard. Also in the case of **Samuel Kiiru Gitau Vs John Kamau Gitau HCCC No. 1249 of 1998 (1998) KLR Judge Visram** (as he then was) held that:-

“For a matter to be res-judicata it must be one on which the court has previously exercised its judicial mind and has after argument and consideration, come to a conclusion on the contested matter and for this reason a matter is said to have been heard and finally decided”.

Justice Visram Judge further held *“Where a matter was directly and substantially in issue in a former suit is to be determined by reference to the plaint, the written statement, the issues and the judgement and the test of **res-judicata** is an identity of issues and not identity of property involved in the former suit”*

In the instant suit, though the issues and parties are similar to CMCC 1924/2011 which was dismissed for having abated, the Court in CMCC 1924/2011, did not refer to the pleadings and did not hear the matter substantially. The suit CMCC 1924/2011 was dismissed on technicality. Having also taken into account the provision of article 159 of the constitution which provides that article (59) (1) (d)

“In exercising judicial authority, the court and the tribunals shall be guided by the following principles....justice shall be administered without undue regard to procedural technicalities”.

The Plaintiff in his Replying Affidavit, stated failure to take summons was not caused by his fault but by the fault of his advocate. He also submitted that he filed a fresh suit as the Chief Magistrate’s Court has no jurisdiction over Environment and Land matter. The ELC court was put in place in the year 2012. The suit was dismissed in April, 2012. The instant suit was filed on 12/10/2012. By then the ELC Division had been set up and I concur with the plaintiff that there was no need of filing an application for revival of CMCC 1924/2011 in a court that jurisdiction would have been challenged.

The plaintiff came to court to seek for justice. I will also be guided by Section 1(A) of the Civil Procedure Act which provides the overriding objectives of the Act and the Rules are to facilitate **just** and **proportionate** resolution of Civil Disputes. In the instant case, the overriding objective is to decide the case in a **just** way without regard to technicalities.

Having considered the Notice of Motion in totality, the Court finds that this suit is not res-judicata. The applicant hinged his application on the fact that this suit is Res-Judicata. Having found that the same is not Res-Judicata then, the Court finds no reason to strike out the plaint.

The Plaint filed on 12/10/2012 raises triable issues and it should be heard and determined on merit.

The upshot herein is that, the Notice of Motion dated 15/2/2013 is dismissed with costs to the Plaintiff/Respondent.

Dated, Signed and delivered this 14th day of June, 2013.

L.N. GACHERU

JUDGE

In the Presence of:-

Mulanjo for the Plaintiff/ Applicant

Ms Atieno holding Mbichire the Defendant/ Respondent