



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 241 OF 2012

1. TASTE OF KENYA LTD.
2. ANISHA BEGUM THOBANI..... PLAINTIFFS

VERSUS

1. KIRAN C. JETWA
2. CLARE M JETHWA
3. ANTHONY KIMURI

(T/A TOSAK INVESTMENTS COMPANY)DEFENDANTS

RULING

1. The 2nd Plaintiff and another person (not the 1st Plaintiff) were the 1st and 2nd Defendants' tenants in the suit premises. The premises were let out to be used only as retail and wholesale of costume jewelry, cosmetic products and hair and beauty products. The premises were not to be used for any other purpose without the written consent of the landlords or their authorized agent.
2. In the course of time the other person left the premises and the 2nd Plaintiff was left alone. She subsequently changed use of the premises and started running a restaurant therein, apparently through the 1st Plaintiff.
3. The Plaintiffs have pleaded that the change of user was with consent of the Defendants (the 3rd Defendant appears to have been the 1st and 2nd Defendants' authorized agent).
4. The Plaintiffs have further pleaded that after running the restaurant business for a while the Defendants commenced constant harassment of the Plaintiffs and failed "to address pertinent issues like sewerage disposal and drainage," leading to the Plaintiffs suing the Defendants vide **Nairobi HC ELC No. 193 of 2008** (hereinafter called the **previous suit**) seeking an order for quiet possession and damages for loss of business. The said suit was said to be pending.
5. In the present suit the Plaintiffs sought in the plaint the following main reliefs –
 - i. A declaration that the Defendants have unduly denied the Plaintiffs consent for change of user of the premises.
 - ii. An order to allow the Plaintiffs to sell their restaurant business to a willing buyer forthwith.

6. Together with the plaint the Plaintiffs filed **notice of motion dated 22nd May 2012**. They sought the main order that they be “allowed to sell their restaurant business as a going concern”. That application is the subject of this ruling.

7. The Defendants opposed the application by **grounds of opposition dated 4th June 2012** and **replying affidavit** filed on the same date. The points taken include –

- i. That the application is *res judicata* in view of the ruling dated 19th July 2011 (Muchelule, J) in the previous suit.
- ii. That the suit is *sub judice* vide the previous suit and an abuse of the process of the court.

To the affidavit are annexed a copy of the ruling dated 19th July 2011 and the pleadings in previous suit, among other documents.

8. The application was canvassed by way of written submissions. The Plaintiffs’ submissions were filed on 8th August 2012 while those of the Defendants were filed on 26th September 2012.

9. On 7th March 2013 the court was informed that the situation on the ground had “radically changed” in that the Plaintiffs had vacated the premises, and that the said event had overtaken the application except for the issue whether or not the suit is *res judicata*. Learned counsels stated that they had addressed that issue in their respective submissions. They agreed that the court write a ruling only on the issue whether or not the suit is *res judicata*.

10. I have considered the parties’ respective submissions on the issue of *res judicata*, including the authorities cited.

11. **Section 7 of the Civil Procedure Act, Cap 21 (the Act)** states –

“7. 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.”

12. The court was informed that the previous suit (Nairobi HC ELC NO. 193 of 2008) is still pending. It has not been heard and determined, or otherwise disposed of, yet. For the principle of *res judicata* to come into play the previous suit, or the issue at hand, must have been **heard and fully decided** by a court competent to try the subsequent suit.

13. Thus, as long as the previous suit remains unheard and not finally determined, even if all the other parameters were met (and I do not consider it necessary to make that determination now), the present (subsequent) suit cannot be declared to be *res judicata*, and I decline to do so, for now. It is so ordered.

14. Costs shall be in the cause.

DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF AUGUST 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 22ND DAY OF AUGUST 2013