



**“striking out” and “dismissing” a suit**

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**CIVIL SUIT NO. 58 OF 2012**

**ENOCK KIRAO MUHANJI.....PLAINTIFF/RESPONDENT**

**=VERSUS=**

**HAMID ABDALLA MBARAK.....DEFENDAN/APPLICANT**

**RULING---**

### **Introduction**

1. The Application by the Defendant is the one dated 9<sup>th</sup> October 2012. The Application is brought under Order 3 Rule 15(1) (d) of the Civil Procedure Rules and it seeks for the following reliefs.
  - a. **That the Plaintiff dated 18<sup>th</sup> April 2012 and filed in court on 20<sup>th</sup> April 2012 be struck out with costs**
  - b. **The costs of the Application to be provided for.**

### **Defendant's/Applicant's case**

2. The Application is premised on the grounds that the Plaintiff had filed a previous suit before the Resident Magistrate's court, Kilifi, being RMCC No. 711 of 2006 over the same issue and subject matter of this suit; that by a decree issued on 24<sup>th</sup> June 2008, the Plaintiff's suit in RMCC No. 711 of 2006 was dismissed with no order as to costs and that the Plaintiff as well as the entire suit is an abuse of the process of the court.

### **Plaintiff's/Respondent's case**

3. The Plaintiff filed his Replying Affidavit on 17<sup>th</sup> June 2013 and deponed that although he filed RMCC No. 711 of 2011, the Defendant objected to the jurisdiction of the Magistrate's court and filed an Application seeking for the dismissal of the suit for want of jurisdiction.
4. The Plaintiff further deponed that the consent recorded in RMCC No. 711 of 2006 at Kilifi does not bar him from filing another suit because the Magistrate's court did not have jurisdiction.

### **Submissions**

5. The parties agreed to dispose of the Application by way of written submissions. The Defendant/Applicant submitted that the current suit offends the provisions of section 8 of the Civil Procedure Act, Cap 21; that the suit also offends the decree in RMCC No. 711 of 2006 which was determined in the lower court suit and that the entire suit as framed constitutes abuse of the process of the court and is *res judicata*.
6. The Defendant's/Applicant's counsel finally submitted that when a suit has been dismissed, it is a bar to litigation of the matter and thus open to a likely plea of estoppel per rem judicata, unlike in a situation where a suit is struck out. Counsel relied on the case of **Abayami Babatunde Vs Pan Atlantic Shipping and Transport Agencies Ltd; Supreme Court of Nigeria NO. 154/2002**.
7. The Plaintiff/Respondent's counsel submitted that for the court to determine if the suit is *res judicata* or not, the court should be guided by the provisions of section 7 of the Civil Procedure Act.
8. According to counsel, although the parties in RMCC No.711 of 2006 are the same as the parties in the current suit, the said suit was not heard and did not settle all the issues between parties in that suit.
9. The Plaintiff's counsel finally submitted that a matter is heard and determined when the court which has heard it has exercised its judicial mind on the matter in controversy after it has heard arguments, considered it and came to a decision on it. That did not happen in this case. Counsel relied on the case of **Solomon Kitundu & 2 Others Vs Park Towers Ltd & 2 Others and Anaj Warehousing Vs National Bank of Kenya (2006) e KLR**.

### **Analysis**

10. The only issue that I am supposed to determine in this Application is whether the current suit is *res judicata* in view of the decree in RMCC No.711 of 2006 and whether the Plaintiff is precluded under Section 8 of the Civil Procedure Act from instituting this suit.
11. The law pertaining to the doctrine of *res judicata* is captured under the provision of Section 7 of the Civil Procedure Act 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 by such court.”**

12. It is not in dispute that the parties in RMCC No. 711 are the same parties in the current suit.
13. It is also not in dispute that the issue in RMCC No. 711 of 2006, that is the legitimate owner of Kilifi Town/Block III/1095, is the same issue in the current suit.
14. I have perused the decree in RMCC No. 711 of 2006 annexed on the Defendant's application. The said decree was extracted pursuant to an Application by the Defendant which was allowed by the consent of the parties.
15. The Defendant's Application in the lower court sought for the “striking out” of the Plaintiff's Plea and the “dismissal” of the suit with costs. The main ground for the said prayer was because the lower court did not have jurisdiction to try the suit.
16. A consent by the parties allowing the Defendant's Application was entered into and the Magistrate, after considering the Application and the consent made the following order:

**“The Plaintiff's suit be and is hereby dismissed with no order as to costs”.**

17. The Defendant, by his own Application in the lower court admits that the only reason that made the lower court to dismiss the suit was because of the consent of both parties that the court did not have the jurisdiction to deal with the issues raised in the suit.
18. It is true, as argued by the Applicant that when a suit is dismissed, one might not be allowed to file a fresh suit unlike in a situation where a suit has been struck out.
19. The words “dismissed” and “struck out” are terms of art and are not supposed to be used interchangeably in a Ruling or Judgment. However, more often than not, the terms are used

- interchangeably by the litigants and the courts.
20. It is therefore incumbent that when the court is called upon, like in this case, to determine whether a party can file a fresh suit after the first one has been dismissed or struck out, the court should look at the circumstances of each case to arrive at a decision. The mere fact that the trial court uses the words “dismissed” does not expressly mean that a fresh suit cannot be filed if indeed the court meant that the suit should have been “struck out” so as to allow a party to file a fresh suit.
  21. For me to determine if the current suit is *res judicata*, the only question that I have to ask myself is whether the issues which were before the lower court between the Plaintiff and the Defendant herein were determined by the court.
  22. The issue as to the ownership of parcel of land number Kilifi/Township/Block III/1095 was never heard and determined by the Magistrate in the lower court.
  23. Before the matter could proceed for the hearing for the determination of the said issue, the parties consented that the lower court did not have the jurisdiction to hear the matter. The Magistrate proceeded to dismiss the suit on that ground alone.
  24. It is trite law that a court without jurisdiction cannot hear a matter. It therefore follows that the court in RMCC No. 711 of 2009 could not hear the issues raised in the said suit and even if it had proceeded to hear and determine the issues, the determination would have been null and void.
  25. Despite the fact that the Magistrate erroneously “dismissed” instead of “striking out” the suit for want of jurisdiction, I find that the suit before me is neither *res judicata* nor an abuse of the court process. The issues before the court in RMCC No. 711 of 2006 were never heard and determined.
  26. In the circumstances, and for the reasons I have given above, I dismiss the Defendant's Application dated 9<sup>th</sup> October 2012 with costs.

Dated and Delivered in Malindi this 31st day of October, 2013

**O. A. Angote**

**Judge**