



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 555 of 2011

MULGOLD LIMITED PLAINTIFF

V E R S U S

MAIMUNA ABDALLAHI MOHAMED 1ST DEFENDANT

ABUBAKAR SALIM MOHAMED 2ND DEFENDANT

RULING

1) The Defendants have raised a Preliminary Objection to the Plaintiffs' application of 26th April 2012 on the ground that the application is Res Judicata that dated 10th April 2011. The latter application was dismissed by Court on 27th October 2011 when the Applicant failed to attend Court to prosecute it.

2) These are my short observations of the Preliminary Objection.

3) The Doctrine of Res Judicata applies to applications just as it does to suits (see Nrb HCC 2222 of 1999 Afab Establishments Ltd & Others –Vs- Najmudin Jiwaji Ganijee & 2 Others where Alnashir Visram, J (as he then was) quoted the following passage from The Court of Appeal Decision in Uhuru Highway Development Ltd –Vs- Central Bank of Kenya & Others Civil Appeal No. 36 of 1996-

“There is not one case cited to show that an application in a suit once decided by Courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature That is to say, there must be an end to applications of similar nature: that is to say further, wider principles of res judicata apply to applications within the suit.”

The principles on the doctrine applicable to suits would apply to applications.

4) Now, I must straightaway say that the plea cannot be successfully taken in the instance before Court because the dismissal of the application of the earlier application of 10th April 2011 was for non-attendance. The application was not dismissed on merits. This is the order of dismissal-

“As the Plaintiff’s Counsel has failed to attend Court for the hearing of its application dated 10th October 2011, I dismiss the said application and vacate the Orders of interim injunction made by the Court on the 10th October 2011.”

Res Judicata does not apply where the earlier application has not been dismissed on merit.

5) For that reason I disallow the Preliminary Objection dated 26th April 2012.

Dated and delivered at Mombasa this 18th day of October, 2012.

**F. TUIYOTT
JUDGE**

Dated and delivered in open court in the presence of:-

No appearance for the Plaintiff

Kabebe for Gikandi for the Defendants

Court clerk - Moriasi

**F. TUIYOTT
JUDGE**