REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 540 of 2012

VEVET EPZ LIMITED.....PLAINTIFF

VERSUS

SAMEER EPZ LIMITED.....1ST DEFENDANT

SIMON KIBUE T/A RESTORERS CONSULTANT AUCTIONEERS.....2ND DEFENDANT

R U L I N G

1. On 24 August, 2012, the Plaintiff herein obtained injunctory orders from this court in Mombasa restraining the attachment, removal, sale, disposition or any other interference with the assets listed in a Proclamation Notice dated 10 August, 2012 issued by Restorers Consort Auctioneers pursuant to distraint instructions issued to that firm by the first Defendant herein claiming rent arrears as at 30 June, 2012 of Shs. 30,120,048/-. Such orders were issued arising out of a Notice of Motion dated 22 August, 2012 filed under certificate of urgency. The said injunctory orders were granted pending full hearing and determination of the said Notice of Motion. The matter next came before court in Nairobi on 5 September 2012 when Mr. Thangei, who appeared for the Defendants, informed the court that he had filed a Preliminary Objection as there had been a previous suit filed seeking the same injunctory orders. Mr. Ochola, who appeared to the Plaintiff, also held brief for Mr. Karungu for the Objector. He stated that the Objector was not involved in any way in the earlier suit but that the Plaintiff needed more time to reply to the Preliminary Objection. He pointed out that there were in fact two Applications before court the first by the Plaintiff as above and the second by the Objector asking for the Proclamation to be lifted as regards his motor vehicle lorry registration no. KAS 164H. Eventually the hearing of the Preliminary Objection commenced before me on 28 September, 2012 with the injunctory orders still in place.

2. The Plaintiff's said Notice of Motion was dated 22 August 2012 and sought the restraining orders as above while the Objector's Notice of Motion dated 23 August, 2012 asked for the Proclamation of the motor vehicle registration no. KAS 164H to be lifted. The Objector's Application was supported on the following grounds:

"1. The Objector has learnt that his lorry KAS 164H has been proclaimed by the 2nd Defendant auctioneer, together with other assets that do not belong to him.

2. The 14 day period prior to attachment of the proclaimed assets, expires on Friday 24th August 2012.

3. The present application seeks to lift the proclamation in respect of the objector's lorry in order to prevent a wrongful attachment.

4. Due to the urgency of the matter, it is necessary for the said application to be heard during the High Court vacation".

Similarly, the Plaintiff's Application was supported on the following grounds:

"1. The 1ST Respondents Agent, agent Simon Kibue trading as Restorers Consult Auctioneers has served the Applicant with a Proclamation dated 10th August 2012, giving the Applicant 14 days to pay disputed purported rental arrears in the sum of Kenya Shillings 30,120,038/= and auctioneers costs in the sum of Kenya Shillings 854,036/= in default of which the said Auctioneers shall proceed with attachment of the assets of the Applicant.

2. The 14 day notice expires at the end of Friday 24th August 2012.

3. The Plaintiff is emphatic that it does not owe the 1st Defendant any rental arrears, owing to the fact that:

4. Indeed, even the lorry proclaimed does not even belong to the Plaintiff.

5. The auctioneers costs are manifestly excessive and extortionate.

6. Indeed, the Auctioneer wrongfully failed to disclose the values of each asset proclaimed, as required by Rule 12 (a) of the Auctioneers Rules in mandatory terms, opening the door for possible sale of the assets at throw away prices.

7. The Applicant is willing to put up a sum of Kenya Shillings 1,790,000 as security, which is the value of the moveable assets proclaimed.

8. The Applicant shall suffer serious and substantial loss in its business, operations and good will by its customers, should the application hereto not be granted, as the assets proclaimed are the tools of trade for its manufacturing business".

3. The first and second Defendants herein filed a Notice of Preliminary Objection on 31 August, 2012. The said Notice was given both in respect of the Plaint and also the Motion dated 22 August, 2012, filed in court on 23 August, 2012. I take it that the objection is to the Plaintiff's said Notice of Motion rather than that of the Objector as the latter's Application was both dated and filed on 23 August, 2012. The grounds upon which the Preliminary Objection is based are as follows:

"1. THAT the present suit and the Motion alike as taken out, drawn and filed are incompetent, fatally defective and unsustaninable in law or at all.

2. THAT the proceedings herein offend the principle of Res Judicata as provided in Seciton 7 of the Civil Procedure Act Cap 21 Laws of Kenya in view of the fact that there were previous proceedings before this Honourable Court being HCCC NO: 275 OF 2010, Vevet EPZ Limited vs. Sameer EPZ Limited & Another (Hereinafter called the earlier suit) in which the subject matter was directly and substantially in issue as in the proceedings herein.

3. THAT in the earlier suit, this Honourable court heard and finally determined the issues now raised in this suit and motion.

4. THAT in the alternative to 3 hereinabove the proceedings herein are barred by virtue of the operation of the doctrine of issue estoppels.

5. THAT in view of the earlier suit aforesaid the proceedings herein are barred by virtue of the express provisions of Section 6 of the Civil Procedure Act Cap 21 Laws of Kenya.

6. THAT in whole, the applicant herein is vexatious and frivolous litigant and the proceedings herein, an abuse of the court process".

3. The Property Manager of the first Defendant company, Eddah Muthoni Mwangi swore a Replying Affidavit on 31 August, 2012 in reply to the Notice of Motion by the Plaintiff but I consider that all I need to concern myself here are the references in that Affidavit relevant to the Preliminary Objection. In paragraphs 4 to 7 of the same, the deponent detailed that the first Defendant had exercised its right of distress in April 2010 when it maintained that the Plaintiff had fallen into rent arrears of about US dollars 119,477.50. The Plaintiff had gone to court and had filed suit being *HCCC No. 275 of 2010*. It had obtained an interim injunction stopping the first Defendant from taking possession of the suit premises pending the hearing of the injunction application. The deponent detailed that on 16 February 2012, Mr. Justice Njagi had dismissed the injunction application and in his Ruling, the learned Judge had found that the Plaintiff herein was in rent arrears and that the distress was lawful and properly done.

4. Subsequent to that it appeared that proposals were made by the Plaintiff to settle the rent arrears such being not acceptable to the first Defendant. Consequently a further demand had been made of the Plaintiff for the rent arrears now amounting to US dollars 358,572.80. Then at paragraph 25 of the said Replying Affidavit, the deponent stated that she had been advised by her advocate that the Plaintiff had purported to withdraw the earlier suit with no order as to costs. In view of the first Defendant having a counterclaim in that suit, the deponent maintained that the notice of withdrawal had no legal consequences. Then at paragraph 27 of the said Replying Affidavit, Ms Mwangi detailed as follows:

"27. THAT I am advised by Alex Ngatia Thangei Advocate and verily believe the same that the present application as taken out drawn and filed and the suit alike are incurably defective, bad in law, incompetent, a non-starter and the same should be struck out with costs in that;

a) The present application is Res Judicata

b) The Applicant is guilty of deliberate material non disclosure

c) The applicant has admitted owing the rent arrears

d) The lease terminated on 31st August 2012 and possession has since reverted to the 1st defendant and there is no contract which this court can enforce.

e) It is frivolous and a gross abuse of court process".

To my mind, this paragraph sums up the first Defendant's position with regard to its Preliminary Objection and this suit generally.

5. On 28 September 2012, the Objector filed a statement of Grounds of Opposition to the Preliminary Objection. Simply put, the Objector stated that he was not a party to the proceedings in *HCCC No. 275 of 2010* as above. It noted that the Objector had filed his application dated 23 August, 2012 seeking to have the Proclamation in respect of the motor vehicle lorry registration no. KAS 164H lifted as the vehicle belonged to him. The Objector stated that it was not disputed that the said Toyota motor vehicle belonged to him and further, that neither the principle of *res judicata* nor the doctrine of *issue estoppel* applied to the Objector's Notice of Motion dated 23 August, 2012. The Objector also maintained that the Plaint herein and the Application dated 22 August 2012 were both based on a new cause of action which had not been the subject of previous litigation before court.

6. Similarly, Mr. Karanja Kiarie, the advocate on record for the Plaintiff in this suit, swore a Replying Affidavit dated 28 September, 2012. In paragraphs 4 and 5 of his said Affidavit, Mr. Kiarie stated that it had been alleged that this suit should be stayed under section 6 of the Civil Procedure Act because there is a similar matter currently before court being *HCCC No.275 of 2010*. He maintained that the said suit was marked as withdrawn and/or settled on 19 September 2012. He annexed what he termed as a true copy of the Order as exhibit "KK 1"to his said Affidavit. Unfortunately for Mr. Kiarie there was no exhibit "KK

1" attached to the court's copy of his said Affidavit. At paragraph 8 of his said Affidavit, Mr. Kiarie stated that for the doctrine of *res judicata* to apply, the two suits must have been between the very same parties. He noted that in *HCCC No. 275 of 2010* there was a party known as *"Warleen Traders"* who was not a party to this suit and further, in this suit, there appeared Simon Kibue and Julius Macann who were not parties in the previous suit. Further, the deponent maintained that the issues must be the same in both suits. He drew attention to the fact that in the present suit, the Plaint seeks the sum of Shs. 32,385,790/= from the Plaintiff (I presume he meant the first Defendant) for the theft of assets from its premises due to its negligence (I presume he meant the negligence of the first Defendant). In any event the deponent maintained that the causes of action in the two suits were different as were the parties. By way of comment, this court disapproves of advocates who put forward their submissions to court by way of an affidavit rather than filing submissions on behalf of their clients.

7. When counsel appeared before me on 28 September, 2012, Mr. Thangui for the first Defendant, submitted that the Plaintiff and the first Defendant have been in a landlord/tenant relationship. Counsel related what had transpired in April 2010 leading to the filing by the Plaintiff herein of *HCCC No. 275 of 2010*. He noted that the pleadings with regard to that suit were attached to the Replying Affidavit of Ms. Mwangi dated 31 August, 2012. The deponent had also attached copies of the said Ruling of Njagi J. delivered on 15 February, 2012. After that Ruling, the first Defendant, as landlord, began the process of distraint afresh. The proclamations with regard thereto were made on 22 August, 2012. On that day, the tenant, the Plaintiff in both suits, sought to withdraw the earlier suit by filing a Notice of Withdrawal of Suit, again exhibited to the Replying Affidavit. On the same day, the present suit was filed. The initial injunction application was heard in Mombasa by Justice Nzioka who gave the Plaintiff herein interim relief. It was the first Defendant's submission that the Application dated 22 August, 2012 is *res judicata*.

8. Counsel continued by maintaining that the important thing for the court to note was that the Application at pages 2 to 24 of the exhibit as attached to the Replying Affidavit was exactly the same Application as the one being considered presently before court. He observed that the principal parties were the same; the cause of action was founded on a lease between the Plaintiff and the first Defendant. It is the same lease that was in the earlier suit. It is the founding contract of both actions. The other parties involved in the two suits were either agents of the principals or parties claiming through the principals. The injunction sought in the former suit was on the question of rent arrears similar to the current suit. There were allegations that there were irregularities in the Proclamation in this suit, the same as in the former suit. Counsel then pointed to 3 features of the Ruling of my learned brother Njagi J. namely that there were rent arrears, the distress was lawful and the tenant was in breach. As far as the first Defendant was concerned, nothing has changed as between April 2010 and now. No appeal had been proffered against Njagi J's Ruling and there had been no application for review thereof.

9. Consequently, it was counsel's submission that the said Motion by any measure was *res judicata* as per **section 7** of the *Civil Procedure Act*. He particularly referred the court to the authority being **Pop-in (Kenya) Ltd & 3 others vs Habib Bank AG Zürich (1990) KLR 609** as detailed in the first Defendant's list of authorities. Counsel also referred the court to *Civil Appeal No. 36 of 1996* **Uhuru Highway Development Ltd vs Central Bank of Kenya & 2 others (unreported)**. Mr. Thangui acknowledged that there had been some theft of goods from the suit premises but that was of no support to the Plaintiff's Application. What amounted to non-disclosure of material facts or lack of candour on the Applicant's part was that in the body of the Application as well as in the Plaint there had been no mention of the *HCCC No. 275 of 2010*. Counsel referred to the case of **Muigai & Ors vs John Wainaina & 2Ors (2004) eKLR.** On those two points, counsel referred to this court to find that the said Notice of Motion was bad and should be struck out.

10. Mr. Thangui continued with his submissions by maintaining that the present suit Plaint was also bad and irregular and should be struck out pending the hearing of the previous suit. He observed that in that suit the first Defendant therein had a Counterclaim for rent arrears. He submitted that when there is a Counterclaim in a suit, it cannot be withdrawn by the Plaintiff without the consent of the Defendant. In this regard he referred the court to the case of the **Beatrice Mumbi Wamuhiu vs Mobil Oil Kenya Limited (2011) eKLR** in which the court noted therein that where there is a counterclaim in a suit it is treated as a separate suit. More importantly according to counsel, where a party makes an admission in an

earlier suit, he cannot withdraw that suit in order to counter the earlier admission - see the **Pop-in** case (supra). That case also referred to the English suit of **Haystead vs Taxation Commissioner (1925) All ER 56.** Counsel said that the fact that he was referring to was the whole question of rent arrears and he referred the court to a letter from the Plaintiff/tenant dated 16 February, 2012 in which it admitted indebtedness. Similarly, the cycle is repeated in the Certificate of Urgency in that suit along with the first ground of the Application therein which read:

"a) That the Plaintiff does not deny the outstanding rent herein."

Counsel also referred the court to other mentions in the previous case proceedings as to there being no dispute as to rent outstanding. In his view, there were no accounts to be taken as between the Plaintiff and the first Defendant, the Plaintiff only need to pay the rent as detailed in the Lease.

11. In concluding his submissions, Mr. Thangui noted that there was an Objector in the new suit. He submitted that objection proceedings have no feet of their own and must be taken in the context of the pleadings in the suit. If this court cared to strike out the suit, the objection proceedings must suffer the same fate. Counsel observed that the Plaintiff has had possession of the suit premises since April 2010. The rent as at the moment was in arrears by Shs. 30 million. The Lease as between the Plaintiff and the first Defendant expired on 31 August, 2012 thus there was no contract between the parties as of now. Counsel maintained that this court has no business in enforcing a contract between parties that has expired.

12. In her turn, Miss Githii for the Plaintiff referred to the Replying Affidavit sworn by Mr. Kiarie more particularly where it had been alleged that this suit should be saved as *HCCC No. 275 of 2010* no longer exists as it has been withdrawn as per the Order of Mr. Justice Mutava made on 19 September, 2012. On my part, I have checked the court's record for that day and noted that the matter was listed before me not my learned brother Mutava J. There was certainly no Order made by me as to the withdrawal of *HCCC No. 275 of 2010*. Be that as it may, counsel submitted that for *res judicata* to apply the parties to the 2 suits should be the same which was not the case here. Counsel repeated the observations of Mr. Kiarie to that end. She continued that the issues raised in the two suits were different as well as the amounts claimed in the Plaints. In the current suit, there is an injunction sought against the second Defendant. Counsel claimed that in both cases there were different parties and there were different causes of action. She was of the opinion that the Preliminary Objection had no merit.

13. Thereafter, Mr. Kamungu addressed the court as counsel for the Objector. He submitted that counsel for the first Defendant had missed the boat. At paragraphs 12, 13 and 14 of the Plaint the court would see the different causes of action. There had been a stock take on 12 August, 2012 after which the Plaintiff had discovered that its goods were missing worth Shs. 32 million. Counsel referred me to the Police Abstract at page 41 to the Exhibit to the Supporting Affidavit. This had led to a claim for Shs. 32 million as against the first Defendant, the landlord. In counsel's view, this was a new issue that had arisen which is why this has been filed as an entirely new suit. He reiterated what counsel for the Plaintiff had said as to the previous suit having been withdrawn with the consent of the first Defendant. As far as the Objector was concerned, he is the owner of vehicle that was attached on the premises. Consequently, under the new rules, he could have only filed his claim in this suit where all the facts are available. The objection proceedings had been filed in this suit seeking to lift the attachment on the said vehicle and the same is still very much alive. Counsel maintained that the Objector could not be shut out from prosecuting his Application dated 23 August, 2012. The Objector had attached to his Affidavit in support of his Application a copy of the log book for the said vehicle registration no. KAF 164H detailing his ownership thereof. Counsel maintained that the suit ought to be sustained as regards the Objector.

14. Mr. Thangui had the final say on the Application. He submitted that it had been confirmed that that as far as the current suit was concerned, the cause of action arose on 10 August, 2012. At that stage, *HCCC No. 275 of 2010* was still alive and in existence. The Plaintiff therein had withdrawn the same 12 days later. There was nothing to stop the Plaintiff therein from amending his Plaint and detailing its so-called new cause of action. He noted that the Police Abstract at page 91 of the Exhibit to the Affidavit in support of the Application has no connection with this suit. The first Defendant had no access to the Plaintiff's

premises as it had locked the same. He noted that the first Defendant had made a distinction as between the suit and the Plaintiff's said application dated 22 August, 2012. He requested the court to allow the Preliminary Objection.

15. It was not quite correct as submitted by counsel for the first Defendant that the Plaintiff in this matter had not detailed the fact that there was a previous suit filed in this court. Paragraph 16 of the Plaint reads:

"There is no other suit pending between the parties. HCCC 275 of 2010 Nairobi between the the Plaintiff, the 1st Defendant and a third party seeking different reliefs, was withdrawn."

Although the previous suit has been mentioned in the Plaint, it is quite clear that the same had not been withdrawn as at the time of the Plaint was filed. Even if the court accepts, which it does not, that the Plaintiff herein "*withdrew"* the suit by way of its Notice of Withdrawal of Suit dated 22 August, 2012, it has now gone back on the situation by its counsel submitting that this court ordered the withdrawal of that suit on 19 September, 2012. As I have indicated above, this court did nothing of the sort. I am in agreement with counsel for the first Defendant herein that as at the 22nd August, 2012, *HCCC 275 of 2010* had not been withdrawn and the same could not have been withdrawn as the First Defendant therein had a Counterclaim. It is quite clear from the authority of the **Beatrice Wamahiu** case (supra) that:

"…….The withdrawal of the main suit did not affect the counterclaim. A counterclaim is treated as a separate suit under section 35 of the Limitation of Actions Act hence its survival cannot be pegged on the pendency of the primary suit."

I cannot see any good reason why the Plaintiff in that suit and herein, could not have amended the Plaint in the said suit to take into account what it alleges to be a new cause of action.

16. The law as regards *res judicata* cases is now well settled and the **Pop-in** case (supra) to which the first Defendant has referred me, is the milestone decision. In that case the Court held *inter-alia*:

"…. The plea of *res judicata* applies not only to points which the court was actually required by the parties to form an opinion and pronounce judgement, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have been brought forward at the time."

Further with regard to the matter being *res judicata*, **section 7** of the **Civil Procedure Act** provides that:

"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."

Explanation (4) of that section further provides that:

"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

From the above, it is clear that the court will not deliberate on a matter that has been directly and substantially in issue in a previous suit. Further, a matter that the party to the suit ought to have, by reasonable diligence, raised in the former suit, will be deemed as determined by the court in that suit.

17. I have also gleaned some assistance from 3 English cases as follows. Firstly the case of **Director of Public Prosecutions v Humphrys (1976) 2 All ER 497** in whichthe court referred to the decision of **Lord Diplock** in **Mills vs Cooper (1967) 2 All ER 100 at P. 103** who hadthis to say:

"…. a party to civil proceedings is not entitled to make, as against the other party, an assertion,

whether of fact or the legal consequence of fact, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings, has since become available to him."

In **Mills vs Cooper**, the issue for determination by the court was whether the matter in a case had been concluded in a previous suit brought on similar facts. It was held that the issue had been heard and determined in a previous suit and the prosecution was barred from re-opening the question and hearing the case the new. **Lord Diplock**, in rendering his decision, referred to the case of **Haystead vs Taxation Commissioner (1925) All ER 56**, referred to by counsel for the first Defendant herein, wherein he observed:

"…. the issue estoppel results in there being no issue in the subsequent civil proceedings to which such evidence would be relevant. Issue estoppel is a particular application of the general rule of public policy that there should be finality in litigation."

Further, in **Mcllkenny vs Chief Constable (1980) 2 All ER 229, Lord Loreburn** struck out the action by saying:

"The issue had already been finally determined against them by a court of competent jurisdiction in the criminal proceedings to which they were parties, and in those proceedings they had a full and fair opportunity of presenting their case, and in all the circumstances it would not be just to allow them to re-open the issue… In any event it would be an abuse of process to all the Plaintiffs to litigate again the identical issue to that which had already been decided against them in the criminal proceedings, and they would not be permitted to call the further evidence on which they sought to rely…"

Bearing the above in mind, it seems that the litigation can only be reopened if the Plaintiff can show that the judgement was obtained by fraud or collusion or that there is new evidence that could not have been, by reasonable diligence, adduced at the hearing of the previous suit. It would not only be an abuse of the process but also unfair and unjust and against the principle that litigation has to come to an end.

18. In the present suit, the Plaintiff has added a new cause of action as against the first Defendant covering the value of assets that it maintains were stolen from the suit premises due to the first Defendant's negligence. However, the claim for a permanent injunction is still there this time referring to the fresh efforts of the first Defendant to distrain for its rent. I am acutely aware of the finding of my learned brother Njagi J. in his said Ruling dated 16 February, 2012. Taking into account section 15 of the Distress for Rent Act, the learned Judge found that the distress for rent effected in April 2010 was lawful and that the Plaintiff had no basis for complaint. The learned Judge went on to find that:

"Distress for rent cannot be rendered unlawful by any irregularity, and the Applicants cannot rely on any such irregularity for injunction. However, they can recover any special damage occasioned by any alleged wrongful act or irregularity. I therefore find that it has not made out a *prima facie* case with a probability of success and thus it has not satisfied the basic condition for the grant of an interlocutory injunction."

Then later in his Ruling the Judge had this to say:

"…….. an injunction will be refused to a contracting party who fails to perform his part of the bargain. Unfortunately, that is the position in which the Applicant finds itself. There is ample *prima facie* evidence that it is in breach of the tenancy by falling into arrears of rent. It is not entitled to an interlocutory injunction while at the same time it is dishonouring its obligation to pay rent. He who comes to equity must do equity."

19. I have perused the Plaint in *HCCC No. 275 of 2010*. Prayer (a) seeks a permanent injunction restraining the Defendants from distressing the Plaintiff's property or otherwise interfering in any other way with the Plaintiff's peaceful, quiet possession and enjoyment of the suit premises. Prayer III (a) of the Plaintiff in this suit also seeks a permanent injunction but this time restraining the sale or other disposition of those assets listed in the Proclamation Notice dated 10 August, 2012. To my mind the two prayers are substantially the same and seek orders of this court to prevent the first Defendant from distraining for rent owed. There is no doubt in my mind that rent is owed and a substantial amount at that. From the Exhibit attached to the Replying Affidavit of Ms. Mwangi, it is quite clear that the first Defendant has forwarded a composite statement of account as regards rent owing by the Plaintiff. As the counsel for the first Defendant has stated, it is interesting to note that the alleged value of the assets allegedly stolen from the suit premises are more or less comparable with the amount of rent that the Plaintiff owes to the first Defendant. If it hadn't been for that prayer, I would have no hesitation in striking out this suit bearing in mind the estoppel doctrine in that connection. Further, I do take on board the point raised by Mr. Kamungu that the Objector's Notice of Motion dated 23 August, 2012 is not the subject matter of this Ruling and by striking out the suit, I would be depriving the Objector of any remedy to which he may be entitled hereunder.

20. However, what of the Plaintiff's Application for injunction as per prayers 2 and 3 of its Notice of Motion dated 22 August, 2012? I have taking into account here the findings of the Court of Appeal in the **Uhuru Highway Development** case (supra) as regards the principle of *res judicata* applying to applications before court quite apart from suits. The issue before the Court was whether the Applicant, having lost one injunction application, can apply for the same or similar injunction once again? The Court then considered the definition of the word "suit" as per **section 2** of the *Civil Procedure Act* and it found as follows:

"what stands out as most important here is that section 89 of our Civil Procedure Act makes it mandatory to follow the procedure provided in the Act to all proceedings in any Court of Civil jurisdiction. That can only mean that interlocutory proceedings come within the purview of the word "suit" for the purpose of the issue of *res judicata* by virtue of section 89 of our Civil Procedure Act."

What I think leads to the demise of the Plaintiff's said Application is the subsequent finding of the Court of Appeal in the same case:

"The long and short of all this is that once an application for injunction within a suit has been heard and determined under the principles as laid down in *Giella v Cassman Brown*, a similar application cannot be brought unless there are new facts, not brought before court earlier after exercise of due diligence, which merit a re-hearing and possible departure from the previous ruling. Such cases, of course, must be very few and far in between."

21. In my opinion, the injunctions sought by the Plaintiff in its said Notice of Motion dated 22 August, 2012 are so similar to those canvassed before my learned brother Njagi J. that I have no hesitation in holding that the same are *res judicata*. The up-shot of the above is that I dismiss the Plaintiff's said Application with costs to the first Defendant. Further, I find that despite the Plaintiff's Notice of Withdrawal, suit *HCCC No. 275 of 2010* is still alive and yet to be determined, particularly as regards the first Defendant's Counterclaim therein. Furthermore, for the benefit of the Objector than anybody else, I declare that this suit remains in being to await determination.

DATED and delivered at Nairobi this 18th day of October 2012.

J. B. HAVELOCK
JUDGE