



CIVIL PRACTICE AND PROCEDURE

- **Consideration of what constitutes res judicata.**

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL CASE NO. 149 OF 2010

MICHAEL KUNG'U KIGIA

APPLICANT

VERSUS

R.W. KUNG'U

RESPONDENT

RULING

The plaintiff who is the husband of the defendant filed this action seeking for an order that the title of parcel number *Ntima/Igoki/3292* (the suit property) which he pleaded he entrusted in the defendant be cancelled and be registered in his name. There is an interlocutory application yet to be heard *inter parties*, that is, Chamber Summons dated 19th November 2010. That Chamber Summons seeks for an order of injunction to stop the defendant from disposing, alienating or interfering with the suit property. An order was issued by consent of the parties on 29th November 2010 which stopped the selling or alienating the suit property until the determination of the injunction application. The defendant before the hearing of that injunction application raised a preliminary objection on two grounds. The first ground is that the entire suit is incurably defective on the face of the pleadings. The second one is that the application for injunction and the suit are *res judicata*. The defendant in support of that preliminary objection argued that the plaintiff had other suits in the lower court relating to the same subject matter, that is, the suit property. Further, the defendant argued that the plaintiff had failed to sue three other persons who are her co-owners of the suit property. The plaintiff responded by saying that he had withdrawn the lower court cases. He further argued that the present suit is not defective. Both the plaintiff and the defendant acted in person and they failed in their submissions to give the court details of the lower court cases. I was able, in looking at the various annexures to the affidavits in this matter, to find two case numbers of the lower court which I have had an opportunity to peruse. In considering the preliminary objection, it is pertinent to refer to the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd Vs. West End Distributors Ltd** [1969] E.A. Preliminary objection as per Law J.A. is:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a

preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Charles Newbold P. stated in the same judgment:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

Having considered that case, does the preliminary objection meet that mark? My perusal of the lower court file Chief Magistrate Meru Misc. No. 7 of 2010 reviewed that the plaintiff had filed that action against the same defendant in this action but the action was dismissed because the plaintiff had in that action failed to file a plaint as required under the old Civil Procedure Rules, that is, order 1B rule 1. That rule required:-

“Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.”

Section 2 of the Civil Procedure Act defines what pleading is:-

“Pleading” includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.”

The plaintiff in the Chief Magistrate Court Misc. 7 of 2010 only filed a Chamber Summons for an injunction which was not supported by a plaint. As a result on 2nd February 2010 Principal Magistrate S.N.K. Andriessen dismissed the action on the basis that it was not founded on plaint. There is no evidence that the plaintiff appealed against that decision. On dismissal of that action, the plaintiff filed again before the Chief Magistrate Court Meru Civil Suit No. 33 of 2010. In this suit, there was a plaint. The suit was against the following defendants:-

1. Rosalid Wanjiru
2. Joram Kigia
3. Stephen Maina
4. Joseph Mburu

In that case the plaintiff, as in this case, sought the cancellation of the title of the suit property which he said had been registered in trust in the defendant's names. He sought that on that registration being cancelled, the title be issued in his name. He additionally sought the eviction of the defendants from the suit property. Whilst that suit before the Chief Magistrate Court subsisted, the plaintiff came to this court

and filed this present case on 19th November 2010. This case as it can be seen is filed against only one defendant R.W. Kung'u. From the perusal of the previous cases in the lower court, it is clear that the initials R.W. stand for Rosalid Wanjiru. At this point I wish to consider whether this High Court matter is *res judicata*. Section 7 of the Civil Procedure Act provides:-

“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.”(Underlining mine)

The plaintiff, I believe, on learning of this preliminary objection proceeded to the lower court and filed a notice of withdrawal of CMCC No. 33 of 2010. At the time of withdrawing that case, the case had not been heard or determined. It would therefore seem that the provisions of section 7 of the Civil Procedure Act do not apply to that case. A case in point to assist me in my deliberation is **Hoystead and Others Vs. Taxation Commissioner**, [1925] ALL ER RE 56 AT PG 6 where it was held:-

“The admission of a fact of fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgment upon a different assumption of fact; Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted, litigation would have no end, except when legal ingenuity is exhausted. It is principle of law that this cannot be permitted.”

Chief Magistrate Misc. No. 7 of 2010 was not determined on merit. The action was dismissed for being incompetent in form. That action therefore cannot be said to be *res judicata* to this suit. Similarly, CMCC No. 33 of 2010 was withdrawn before being adjudicated. That too is not *res judicata* to this suit. It follows that ground number 2 of the defendant's preliminary objection fails and is dismissed. Costs will however not be awarded to plaintiff on this failed ground because the plaintiff withdrew the lower court's suit to defeat the plaintiff's preliminary objection. In respect of the objection that the plaintiff suit is incompetent for failing to include the defendant's co-owners of the suit property, I find that there is merit in that ground. I do not however agree with the argument of the defendant that the failure to include those defendants makes this case to be fatally defective. This is because order 1 rule 10 of the new Civil Procedure Rules enables the court to add parties ***“whose presence before the court may be necessary in order to enable the court effectively and completely to adjudicate upon and settle all questions involved in the suit.....”*** It is for that reason I make the following orders:-

1. Ground 2 of the preliminary objection dated 29th November 2010 is dismissed with no orders as to costs.

2. Ground 1 succeeds with costs being awarded to the defendant.

3. The court orders the plaintiff to amend the plaint in this action within 10 days from today's date to include the defendants, Joram Kigia (2nd defendant), Stephen Maina (3rd defendant) and Joseph Mburu (4th defendant) whilst retaining Rosalid Wanjiru as the 1st defendant. In default of amendment as ordered herein being carried out by the plaintiff, the suit shall stand as dismissed.

4. The amended plaint shall be served on all defendants including the 1st defendant Rosalid Wanjiru within 14 days from today's date.

5. This case shall be mentioned before court in order for the court to confirm that the amendment has been undertaken by the plaintiff and for the court to give further directions for the hearing of this suit. A mention date shall be given at the reading of this ruling.

Dated, signed and delivered at Meru this 10th day of February 2011.

MARY KASANGO

JUDGE