REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 1565 OF 2000

LIVINGSTONE KUNINI OLE NTUTU.....PLAINTIFF

V E R S U S

COUNTY COUNCIL OF NAROK.....1ST DEFENDANT

OLKIOMBO LIMITED.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

R U L I N G

The 1st Defendant filed an application seeking the review of the consent judgment and decree entered on 24th November 2005 in favour of the Plaintiff against it. It was alleged that the consent was entered into fraudulently, illegally and unconstitutionally and without the participation of the 2nd and 3rd Defendants. The Plaintiff opposed the application by filing a notice of preliminary objection whose grounds were that the application is *res judicata* and issue estoppel, and that it is an abuse of the process of the court.

When Mr. Kemboy (holding brief for Mr. Kilukumi for the Plaintiff) sought to prosecute the objection, Mr. Omogeni for the 1st Defendant opposed the move and sought that the objection be heard in response to the application. His contention was that the objection raises mere technical issues. His other concern was that the parties had on 18th January 2011 appeared before Justice Maraga and agreed as follows:-

"By consent the application dated 12th March 2009 be heard on 23rd February 2011. Interim orders

extended till then."

He argued that if the Plaintiff wanted his objection taken first he should have indicated to the court and direction given in that regard. I agree with Mr. Kemboy that no representations were made in regard to the objection or whether it should be heard in priority. Once the motion was given a date, the parties were expected to come on the day and appropriately deal with all issues relating to the same including the objection.

Mr. Omogeni, relying on Article 159 (2) (d) of the Constitution, submitted that the court should ignore any procedural matters or objections and deal with the substance of the application. He asked the court to bear in mind that the dispute involved 1600 Hectares of land in the world reknown Maasai Mara Game Reserve. Mr. Kemboy's response was that the Article did not intent to upset clear and well-settled principles of law; and that the objection was not merely technical as its effect is to dispose of the entire application.

In **Mukisa Biscuit Manufacturing Co. Ltd –Vs- West End Distributors Ltd [1969] EA 696** the Court of Appeal for East Africa deprecated the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. Sir Charles Newbold, P, stated as follows:-

"A preliminary objection is in the nature of what used to be a de-murrer. 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."

On his part, Law, J.A observed as follows:-

"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."

Under section 7 of the Civil Procedure Act the court cannot try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them, 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 upon. The Plaintiff is saying that in the application dated 6th June 2002 brought under sections 3A and 80 of the Civil Procedure Act and Order 44 rules 1 and 6 of the Civil Procedure Rules, the 2nd Defendant made a similar request and on the same grounds for the review and/or the setting aside of the consent judgment herein. He says that application was by consent struck out. Certainly, the court has to discuss whether that application was between the same parties, and whether it was heard and determined. The court will decide whether the issues in this application were finally put to rest in the earlier application.

In other words, whereas the successful plea of *res judicata* can bring this application to conclusion without having to deal with its merits, it is clear that there are a number of issues relating to the previous application that have to be ascertained and decision made thereon. In my view, the most expeditious and

efficient way to deal with the matter at hand is to allow the application be prosecuted and for the Plaintiff to be allowed to raise the issues in the objection in response to the same. I hereby so order, and also ask that costs do abide the application.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH 2011

A. O. MUCHELULE

J U D G E