



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HIGH COURT CIVIL APPEAL CASE NO. 28 OF 2003**

**DR. ALI WARIO ..... APPELLANT**

**VERSUS**

**DR. JOHN NGONDU ..... RESPONDENT**

**RULING**

The execution being undertaken in this matter by the appellant is in respect of costs awarded to the appellant. Those costs were determined on 25<sup>th</sup> September 2009, by a reference to this court, at Kshs. 144,480/=. After that determination of that amount, the respondent filed a Chamber Summons dated 5<sup>th</sup> October 2009. He was then represented by the firm of Charles Kariuki & Co. Advocates. He prayed for:-

***“The applicant (respondent) be allowed to liquidate the claim herein by monthly instalment of Kshs. 10,000 per month.”***

That Chamber Summons was dismissed by this court’s ruling dated 26<sup>th</sup> July 2010. Now the court is faced with a Chamber Summons filed by the respondent dated 14<sup>th</sup> October 2010. That Chamber Summons was filed for the respondent by the firm of G.G. Mugambi & Co. Advocates. The prayer in the Chamber Summons is as follows:-

***“That this Honourable Court be pleased to allow the applicant/judgment debtor (respondent) to defray the costs awarded in this matter of Kshs. 147,780/= in monthly instalments of Kshs. 7,000/= until payment in full.”***

That Chamber Summons dated 14<sup>th</sup> October 2010 as correctly argued on behalf of the appellant offends the doctrine of *res judicata*. Section 7 of the Civil Procedure Act sets out which action would be taken to have offended that doctrine. It provides 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 decided by such court.”***

The respondent filed his Chamber Summons dated 5<sup>th</sup> October 2009 seeking to liquidate costs due to the appellant by payment of Kshs. 10,000/= per month and that application was argued before court and a

ruling delivered on 26<sup>th</sup> July 2010. The Chamber Summons dated 14<sup>th</sup> October 2010 now under consideration in this ruling is indeed *res judicata* in view of the previous Chamber Summons. A useful statement in respect of that doctrine is to be found in the case **Mbeu Kithakwa vs. Phillip Muchiri Mugo** Civil case No. 87 of 2007 as follows:-

***“However, much more than that, it should by now be clear that the plaintiff in filing this case replicated the lower court’s case. Section 7 of the Civil Procedure Act forbids the court from entertaining an action in which the matter directly or substantially had been directly and substantially in issue in a former action which has been heard and finally determined by a competent court. The doctrine of res judicata related to a matter adjudicated upon or a matter upon which a judgment has been pronounced. The plaintiff in opposing the defendant’s argument that the application is caught by that doctrine was heard to say that since the High Court in its judgment in the appeal of the lower court case found that the lower court suit was incompetence for having been initiated by way of miscellaneous application, that the plaintiff was entitled to file this fresh action. Such an argument goes contrary to the practice of law and public policy, that is, there must be finality of litigation. The question whether or not the decision in the previous action was right or erroneous has no bearing on whether it operates as res judicata or not. The converse would take legal practice to a ridiculous heights because every decision would be impugned as erroneous and there would be no finality of cases. The doctrine of res judicata contains the rule of conclusiveness of judgment based on maxim or Roma jurisprudence “interest reipublicae ut sif finis litium” (that is, it concerns the state that there be an end to law suits). See Mulla The Code of Civil Procedure 16<sup>th</sup> edition.”***

On the basis that the Chamber Summons dated 14<sup>th</sup> October 2010 is *res judicata* it will be dismissed. The said Chamber Summons will also fail because it was filed by the firm of G.G. Mugambi & Co. Advocates which firm of advocates did not obtain the leave of the court to act for the respondent as required under order 9 rule 9 of the Civil Procedure Rules 2010. That rule is in the following terms:-

***“9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court –***

- (a) upon an application with notice to all the parties; or***
- (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”***

The respondent having been represented by the firm of Charles Kariuki & Co. Advocates could not be represented by the firm of G.G. Mugambi & Co. Advocates without the leave of the court because judgment had been entered in this matter. It is for those reasons that the Chamber Summons dated 14<sup>th</sup> October 2010 is dismissed with costs being awarded to the appellant.

**Dated, signed and delivered at Meru this 18<sup>th</sup> day of May 2011.**

**MARY KASANGO**

**JUDGE**