



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 315 OF 2000

BAJABER LIMITED PLAINTIFF

VERSUS

KENYA REVENUE AUTHORITY DEFENDANT

RULING

This is the Defendants application dated 13th October 2010 seeking to amend its Statement of Defence dated 14th August 2000 to include a Counter-claim against the Plaintiff herein. The application was opposed by the Plaintiff. Prior to hearing substantive arguments for or against this present application court did direct that both counsel address me on the question of '**Res Judicata**'. This direction was given because following a somewhat similar application by the Defendants in which it sought to amend its Statement of Defence in order to include a Counter-claim against Bank of Africa Limited. That application dated 1st December 2009 was dismissed by this court vide its ruling of 26th April 2010. Five months following that dismissal the Defendants filed this present application. The doctrine of '**Res Judicata**' provides that a court shall not adjudicate on the same matter twice. To this end S. 7 of the Civil Procedure Code provides

“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, 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”

In essence this means that where a question in issue has been directly and substantially determined by a court, that same issue shall not be raised before that same court a second time in a suit involving the same parties. As stated earlier the Defendants did in their application dated 1st December 2009 seek to amend their defence to include a counter-claim against Bank of Africa Limited. The question therefore is whether the present application which also seeks to introduce a counter-claim by way of an amendment to the defence is directly and substantially similar to the application of 1st December 2009 which was dismissed by the court. I have carefully considered the submissions of **MR. REGERU**, counsel for the Defendant in which he argues that the two applications are not directly and substantially the same. Likewise I have given careful consideration to the submissions of **MR. ASIGE** counsel for the Plaintiff in

which he argues that the present application is infact substantially similar to the Defendant's application dated 1st December 2009 and therefore it is Res Judicata. I have also had a re-look at my own ruling dated 26th April 2010. I am persuaded by the submissions made by Mr. Regeru that my said ruling dealt mainly with the question of whether or not the Defendants could be granted leave to enjoin the Bank of Africa in its counter-claim. That is the aspect which I considered and decided in the negative. However the present application seeks to amend the defence to include a counter-claim against the Plaintiff itself and thus no third party will be added to the suit. In my view this is an entirely different matter which was not considered and/or determined in my ruling of 26th April 2010. This though a fine distinction is nevertheless valid and must be made. I do not wish to delve into the merits of the application at this point suffice to say that a discerning eye will definitely detect that the two applications are not infact directly and substantially similar. The language used may be similar but the prayers sought are not the same. For the above reasons I do find that this present application dated 13th October 2010 is not res judicata and direct that the same be listed for hearing.

Dated and Delivered in Mombasa this 21st day of December 2010.

M. ODERO

JUDGE

Read in open court in the presence of:-

Mr. Mwakireti for Plaintiff

Mr. Mutubua holding brief for Mr. Regeru for Defendant

M. ODERO

JUDGE

21.12.2010