



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Miscellaneous Civil Application 585 of 2005

MWINYI HAMISI ALI.....PLAINTIFF

VERSUS

1. MIKE MAINA

2. FLY OVER INVESTMENTS

3. CAUSEWAY ENTERPRISES LTD.....DEFENDANTS

RULING

Before me is a Notice of Preliminary Objection dated 1st April 2009 filed by the 2nd defendant. The objection is against the plaintiff's entire suit on the ground that the same is *Res Judicata*. Counsel for the 2nd defendant contended that the plaintiff had previously filed HCCC No. 732 of 1991 in respect of the same subject matter which suit was determined on merit.

The plaintiff opposed the preliminary objection arguing that the former suit involved a different cause of action. Counsel further contended that the matters canvassed by counsel for the 2nd defendant are not matters which can properly be disposed of in a preliminary objection.

The Locus classicus on preliminary objections is the Court of Appeal case of Mukisa Biscuit Manufacturing Company Limited – v – West End Distributors Limited [1969] EA 696. At page 701 there is the following passage:

“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 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.”

In this case, whereas the 2nd defendant has raised the plea of *res judicata* which is a point of Law, the facts are not agreed. A determination of the objection must necessarily involve ascertainment of facts. The Notice of Preliminary Objection filed by the 2nd defendant merely stated that the plaintiff's suit is *res judicata*. The Notice did not carry the particulars of the former suit or suits. The plea of *Res Judicata* cannot in my view be determined without a consideration of the pleadings. I have perused the 2nd defendant's replying affidavit in response to the plaintiff's claim herein. At paragraph 7 it is deponed as follows:-

“7 That I am further advised by the 2nd defendant’s advocates on record which I verily believe to be true that the plaintiff/applicant sought and obtained orders in respect of plot No. 1112/111/MN in Mombasa High Court Civil Case No. 732 of 1991 and Civil Appeal No. 125 of 1997 and that the applicants are estopped from seeking any such orders against the 2nd defendant in respect to the same property.”

The 2nd defendant fell short of pleading *Res Judicata* in that paragraph. The 2nd defendant does not explain why a claim should not be made against it. It does not also state whether it was a party to those earlier proceedings and whether the issues for determination are the same.

In the premises the plaintiff’s suit against the 2nd defendant cannot be struck out as being *Res Judicata* on the basis of this Preliminary Objection. I find and hold that the objection has been improperly raised and is overruled with costs to the plaintiff. It is so ordered. This is however not a bar to the 2nd defendant appropriately moving the court at any other time.

DATED AND DELIVERED AT MOMBASA THIS 20TH DAY OF MAY 2009.

F. AZANGALALA

JUDGE

Red in the presence of:-

Mr. Gikandi for the Plaintiff and Mutubia for the 2nd Defendant.

F. AZANGALALA

JUDGE

20TH MAY 2009