



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
CIVIL CASE 64 OF 2005

ANNE DELORIE.....PLAINTIFF

VERSUS

THE AGA KHAN HEALTH SERVICE LIMITED.....DEFENDANT

R U L I N G

1. The Defendant filed its application by way of Notice of Motion dated 28/01/2009 seeking orders:
 1. *That the Plaintiff do produce, within 7 days of the date of the order, documents referred to in the Plaintiff's Supplementary List of Documents dated the 22nd February 2008 in terms of a "Notice To Produce Documents" dated the 15th August 2008 and served upon the Plaintiff's Advocates on the 18th August 2008 and "Further Notice To Produce Documents" dated the 17th October 2008 and served upon the Plaintiff's Advocates on the 21st October 2008 of which copies are annexed to the Affidavit of JUDITH ODUGE-OTIENO supporting this application.*
 2. *That in default of compliance with the above Order the Plaintiff be struck out and the suit be dismissed with costs.*
 3. *That the Plaintiff do pay to the Defendant the costs of and incidental to this application.*
2. The application is premised on four grounds as follows:-
 - (a) *THAT the Plaintiff has failed to comply with the Defendant's Notice to Produce Documents dated the 15th August 2008 and Further Notice To Produce Documents dated the 17th October 2008.*
 - (b) *THAT it is in interest of justice to order the Plaintiff to produce for inspection the documents disclosed in the Plaintiff's Supplementary List of Documents.*
 - (c) *THAT the Plaintiff is under mandatory obligation to permit inspection of documents.*
 - (d) *THAT the Defendant will not be able to fully and adequately defend this suit if inspections (sic) of the Plaintiff's documents is not allowed.*
3. The application is also premised on the sworn affidavit of **Judith Oduge – Otieno** dated 25/01/2009. The deponent says that the Plaintiff herein has failed to comply with court orders requiring her to produce documents in support of her case for the Defendant's inspection in accordance with the Defendants

Notice to produce dated 27/08/2008. The Defendant also says that it has fully complied with all the orders of this court and particularly the order dated 20/02/2008. The Defendant says that the finding made by this court on 10/04/2008 and the subsequent ruling of this court dated 4/07/2008 are not understood. It is to be noted that the Defendant is not asking this court to review the rulings complained of by the Defendant.

4. Before the hearing of the application the Plaintiff's advocates filed a Notice of Preliminary Objection to the application, arguing:

1. THAT the application is Res Judicata as the Defendant's application under Rule 20 of the Civil Procedure Rules was dismissed on 4th July 2008.

2. THAT the present application is an abuse of the court process as the Defendant seeks the court to sit on appeal on its own decision.

3. THAT the application is clearly an abuse of the court process and only meant to delay the commencement of the hearing.

5. At the hearing of the application, the parties made both oral and written submissions regarding the Preliminary Objection. This ruling concerns the Preliminary Objection. Learned counsel for the Plaintiff submitted that the present application is res judicata for the reason that a similar application was dismissed by this court on 4/07/2008. Learned counsel argued that the provisions of section 7 of the Civil Procedure Act which codifies the principle of Res Judicata applies on all fours to the application before me now. Section 7 of the Civil Procedure Act provides as follows:-

“7. No court shall try any suit 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”.

6. The Plaintiff's argument is that the Defendant filed a similar application dated 29/04/2005 under Order X Rule 20 of the Civil Procedure Rules which application was heard and eventually dismissed in a ruling delivered on 4/07/2008. The Plaintiff's counsel argued further that since the application dated 28/01/2009 is seeking similar orders, the same should be struck out for being Res judicata. A case in point cited by the Plaintiff is **Trade Bank Limited –vs- L-Z Engineering Construction Limited [2000] IEA 266** where the Court of Appeal said the following at page 270:-

“Issue of estoppel and the doctrine of res judicata arise in these appeals. Issue estoppel and res judicata bar the appellant from re-litigating matters already ruled on by the court, since the point at issue in both appeals is the same and based on the same facts between the same parties and arose out of the action which point had been decided with certainty and it matters not whether the first decision was right or wrong.”

In its further remarks on the issue of estoppel, the Court of Appeal said the following at page 271 concerning the **Trade Bank** case:-

“We may observe that the doctrine of res judicata is a general application in this court and it behooves us therefore to refer to Halisbury's Laws of England (4 ed.), in volume 16 paragraphs 974 and 975 whereof, it has been stated that the doctrine is a fundamental doctrine of all courts that there must be an end to litigation. That doctrine is, for convenience treated as a branch of the law of estoppel. Halisbury's at 859 explains;

7. At page 859 of Halisbury's Laws of England, an explanation is given as to what amounts to an estoppel, namely that:-

“Even though the judgment was pleadable by way of estoppel, it is perhaps not strictly correct to regard its determination of legal rights as a question of estoppel. The parties are estopped by the findings of fact involved in the judgment; as respects the determination of the question of law, the true view seems to be that the parties legal rights are such that they have been determined to be by the judgment of a competent court. The conclusiveness of the determination, however, rests upon the same principle in each case.”

At page 861 of Halsbury’s Laws of England there is some further comment on the issue of estoppel as follows:-

“An estoppel which has come to be known as ‘issue Estoppel’ may arise where a plea of res judicata could not be established because the causes of action are not the same. A party is precluded from contending the contrary of any precise point which having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action, provided it is embodied in a judicial decision is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, of one mixed fact and law.”

8. In the local celebrated case of **Mburu Kinyua –vs- Gachini Tuti [1978] KLR 69**, Madan J (as he then was) said the following on the plea of res judicata:-

“The plea of res judicata applies --- not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject and which the parties, exercising reasonable diligence, might have brought forward at the time”.

On the basis of the above, learned counsel for the Plaintiff argued that if the Defendant was dissatisfied with this court’s ruling dated 4/07/2008, it should have either appealed the ruling to the Court of Appeal or moved this court on a Review Application. Having failed to do either, learned counsel for the Plaintiff urged this court to make a finding that the instant application is res judicata because the matter sought to be adjudicated upon has already been adjudicated upon by a court of competent jurisdiction.

9. In response to these submissions by learned counsel for the Plaintiff, learned counsel for the Defendant argued that the points raised in the instant application are different from those raised by the earlier application and that therefore, the application is properly before court and should be properly adjudicated upon. That in any event, if there is an error in this application, the same is curable under Order 6A Rule 12 of the Civil Procedure Rules which provides as follows:-

“No technical objection may be raised to any pleading on the ground of any want of form.”

10. Secondly, learned counsel for the Defendant argued that this court’s ruling of 4/07/2008 did not address all the issues concerning discovery by the Plaintiff. The question that arises now is whether the Defendant should resolve that apparent inadequacy in this court’s ruling of 4/07/2008 by filing a fresh and similar application as it has done or move the court on a review application or better still, move to the Court of Appeal. Learned counsel for the Defendant conceded that like the previous application, this application seeks orders under same rules as the previous one. He argued however, that the Defendant’s main concern is that the Plaintiff concedes that she has not completed discovery and that for this reason, the Defendant should be granted the orders sought. Learned counsel also argued that the issues raised by this application have not been finally decided by the court and that for this reason, the Preliminary Objection is irrelevant.

11. After weighing the submissions made, it has come out clearly that the issues being raised herein are the same issues that were adjudicated upon by this honourable court’s ruling of 4/07/09. If the Defendant was aggrieved by that ruling, as it appears it was aggrieved, the best course of action was to file an

application for review of my orders or to appeal the ruling to the Court of Appeal. It is my considered view that what the Defendant/Applicant is trying to do is to vex the court by adopting the wrong procedure in trying to resolve the issues pertaining to discovery.

12. The second main point of objection raised by the Plaintiff is that the Defendant’s application is an abuse of the court process. In **Banque Indosuez –vs- D.J. Lowe & Company Limited, Mombasa Civil Appeal No. 79 of 2002** (Unreported) the learned Judges of Appeal held that “---- *it is correct to say that a party who brings for the decision of the court matters which have already been determined more or less in these circumstances, as these can truly be said to be abusing the process of that court.*” In this case, I have already made a finding that in light of the law and the authorities cited, and the facts of this case, this application is res judicata, and it is therefore an abuse of the due process of the court and I so find.

13. There is one final point raised by the Defendant’s learned counsel, and that is that the points raised by the Plaintiff in opposition to the Defendant’s application are not pure points of law as laid down in the well known **Mukisa Biscuit Manufacturing Co. Ltd. –vs- West End Distributors Ltd. [1968] EA 696**, his argument being that the court would have to determine certain other facts before reaching a conclusion on the Preliminary Objection. With greatest sympathy and respect to learned counsel I do not think that there are any facts that I need to establish before making this ruling. The facts in this case speak for themselves. The Defendant wants the court to determine an issue that has already been determined by this court. That is where the matter stops and no further. Learned counsel also submitted that since the Plaintiff has yet to file a Replying Affidavit, her Preliminary Objection cannot be sustained. The court is not aware of such a requirement upon a party seeking to have a matter determined on a Preliminary Objection.

14. In the result, I am satisfied that the Plaintiff’s Preliminary Objection dated 24/03/2009 and filed in court on the same day has merit. The same is allowed. Accordingly the Defendant’s application dated 28/01/2009 be and is hereby struck out with costs to the Plaintiff.

Orders accordingly.

Dated and delivered at Nairobi this 26th day of June 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:

..... For the Plaintiff

.....For the Defendant

.....court clerk