REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

CIVIL SUIT 2561 OF 1994

KARAGITA MIXED SELF HELP GROUP……PLAINTIFF

VERSUS

THIKA RIVER ESTATE LIMITED……..……DEFENDANT

RULING

This court has been informed that there is on record an application by way of a chamber summons dated the 9th day of September 2008 and filed on the 10th day of September 2008. It is brought under order IXB rule 8 of the CPR. It seeks three orders namely:-

(i). *That the exparte judgement entered on the 7th June 2000 and all consequential orders in this suit be set aside.*

(ii). *That the suit be set down for hearing*

(iii). *That the costs be in the cause.*

The plaintiff has raised a preliminary objection to that pplication dated 26th day of September 2008 and filed on 29th September 2009. It raises three grounds of objection namely:-

(i) *"The said application dated 9/10/08 is Resjudicata.*

(ii) *The court has no jurisdiction to hear the said application.*

(iii) *The said application is frivolous, vexatious and an abuse of the court process."*

The grounds in support were given out in the objecting counsels oral submissions in court and these are:-

(1) The said application is Resjudicata because there was a similar application dated 14/9/07 which was struck out on 30/4/08 after it had been heard on 19/2/08.

(ii) That the basis for the striking out are set out in justice Ang'awas ruling exhibited in the replying affidavit which the court is invited to peruse especially page 2 paragraph 2 which reading will demonstrate that the applicant had stated on oath then that he did not know anything about the suit. It is now surprising that he has turned around to say that he now knows about the suit.

(2) The court, is invited to contrast that earlier stand with the applicants' current stand demonstrated by the supporting affidavit sworn on 9/9/08 which go to show that the applicant had all along been aware of the case and he therefore perjured himself before Ang'awa J or in the affidavit as such he has not come to court, with clean hands and as such he should not be indulged.

In response counsel for the respondent opposed the preliminary objection on the grounds that the said preliminary objection has no merit because of the following:-

(i). The plaintiff has no legal capacity to sue or be sued and as such also lacks legal capacity to raise a preliminary objection.

(ii). It is their contention that the provisions of section 7CPA on Resjudicata does not apply because the application relied upon by the objector was struck out but not decided or determined on its merits. This is so because it is on record that the application was struck out because the advocate who had presented the same had no authority to present the same and that the record is clear on this.

(iii). It is now trite or a principle of fundamental importance in the judicial process that matter should be disposed off on their merits instead of them being disposed off on points of technicalities.

(iv). It is also their stand that no point of law has been raised as the court, has been called upon to examine the content of a ruling which is a matter of evidence and not a point of pure law. On the basis of the above, counsel urged the court, to dismiss the preliminary objection.

In response counsel for the objector maintained that they are within the law and their objection on the basis of Resjudicata is sustainable.

On case law the court, was referred to the case of **KEHARCHAND VERSUS JAN MOHAMED (1919-1921) VOL. VIII KLR 64** where it was held by the EACA that "*where a suit for the recovery of money has been dismissed under the Indian limitation Act section 4, the only issue finally decided is the applicability of a prescribed period of limitation*".

The case of **BAKARI ALI OGADA AND 24 OTHERS VERSUS UNILEVER KENYA LIMITED NAIROBI CA NO. 32 OF 2008** decided by the CA on the 5th day of June 2009.At page 3 of the judgement line 6 from the bottom the law lords of the CA quoted with approval the decision in the case of **TRUST BANK LIMITED VERSUS AMALO (2003) IEA 350**.Thus:-

"*The principle which guides the court, in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit. This was succinctly put a while ago by George CJ (Tanzania) in the case of* ***ESSANJI AND ANOTHER VERSUS SOLANKI (1968) EA at 224-*** *The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuit of his right, that accord with the policy of the law as can be gleaned from order IX, rule1 of the CPR whereby a litigant has the right to appear, file its defence and be heard before any interlocutory or final judgement is entered in default against him, regardless of any time limit. The spirit of the law is that as far as possible in the exercise of judicial discretion the court, ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so"*

The case of **EDWARD K.KIMUTHU AND 17 OTHERS VERSUS WERU WAMUTHURWA AND 3 OTHERS NAIROBI HCCC NO 1335 OF 2003** decided by Osiemo J on the 16th day of May 2005. At page 3 of the ruling line 7 from the bottom the learned judge made the following observation:-

"*The 3rd defendant Karagita Mixed Self Help Group is a Self Help Organization registered with the Ministry of Culture and Social Services and the three persons named in the plaint P. Mburu, Ngugi, Ng'ang'a Nyoike and Hosea Mwiika are its office bearers namely Chairman, Secretary and Treasure respectively"*

At page 4 of the ruling line 4 from the bottom, the learned judge went on to state:-

"*Karagita Mixed Self Help Group is registered with the Ministry of Culture and Social Services. This does not give it a legal entity. Anon existent person cannot maintain an action. It can only sue or be sued through its appointed official or office bearer. As I have stated above Karagita Mixed Self Help Group lacks legal entity, it can and sue or be sued through its office bearers who are in this case P.Mburu Ngugi, the Chairman Ng'ang'a Nyoike- the secretary, and Hosea Mwiika- the Treasure"*

The case of **MBURU KINYUA VERSUS GACHINI TUTI (1978) KLR 69,** a court of appeal decision in which it was held interalia dismissing the appeal that "*the second appeal was Resjudicata since the facts in which it was based were known to the applicant at the time when he made the first application."*

The case of **GUPTA VERSUS CONTINENTAL BUILDERS LIMITED (1960) EA 83** whose holding is to the effect interalia that "*who ever asks the court, to take judicial notice of any matter has the burden to prove that the matter is so notorious as not to be a subject of dispute among reasonable men or that the matter is capable of immediate accurate demonstration by resort to readily accessible source if indisputable accuracy."*

The case of **SALOME AHMED HASSANZAID VERSUS FAUD HUSSEIN HUMELDAN (1960) E.A 92,** where it was held interalia that "*a judgement pronounced against a party under rule 178 of the rules of court must be deemed to be a decision on the merits and have the same effect as a dismissal upon evidence and accordingly the matter in issue in the first action must be deemed to have heard and determined, the dismissal of the earlier action therefore operated as Resjudicata."*

On the courts', assessment of the rival arguments in this preliminary objection, it is clear that the issues raised touch both on the technical aspect as well as the merit aspect of the preliminary objection. The technical aspect arises because of the respondents' assertion that the objection raised do not meet the ingredients necessary for raising a preliminary objection. Where as the merits aspect arises because of the assertion that the same is not sustainable.

Neither side has cited to this court, any rule of law or case laying down the yardstick for determining the existence or non existence of a preliminary objection. That notwithstanding the court, is not precluded from turning to case law on the subject that it has judicial notice of . This is no other than the famous case of **MUKISA MISCUIT MANUFACTURING CO. LTD VERSUS WEST END DISTRIBUTORS LTD (1969) EA 696.** At page 700 paragraph D-E LAW JA as he then was had this to say concerning a preliminary objection:-

"*So far as I am aware a preliminary objection consists of a point of law which has been pleaded, or which a rises by clear implication out of pleadings, and which if argued as a preliminary point may dispose off the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submissions that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration"* Whereas Sir Charles Newbold, P. on the other hand on the same subject in the same decision had this to say at page 701 paragraph A-B:-

"*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 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"*

Applying the above principles to the arguments herein, it is clear that from the argument presented by the counsel for the preliminary objector, the grounds for objection arises from remarks made by Ang'awa J in the ruling made in the struck out application. As such what this court, is being asked to look at to determine the preliminary objection is a ruling. In this courts', opinion, the moment, the issue of evidence arises for consideration the objection ceases being a preliminary objection. The court, therefore upholds the respondents assertion that the objection raised by the objector does not qualify to be a preliminary objection as the same is anchored on facts or evidence and not law.

The above findings would have disposed off the objection, but in view of the fact that there is also raised the issue of the Resjudicata which is also a point of law, but which requires facts to establish it, there is no harm in dealing with it as well. Both sides are in agreement that all that needs to be established in order for the objector to succeed on this, is simply to bring the argument within the ambit of the provisions of section 7 CPA which reads:-

"*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, has been heard and finally decided by such court"*

Applying the content of this provision to the Rival argument herein, it is clear that what is being objected to is an application and not a suit. Issue therefore arose whether this provision applies to applications. In this courts', opinion, there is now a wealth of case law emanating both from the court of appeal and as dutifully followed by the superior courts, that this court, has judicial notice of, that the principle is not applicable to determination of suits only, but to other judicial processes where in a judicial determination has been made. This being the case the court, is satisfied that the principle also applies to applications as well and was rightly raised by the objection.

Having ruled that the issue of Resjudicata was properly raised, what is left for determination by the court, is a determination as to whether the same is sustainable or not. Due consideration has been made by this court, of that principle and applied the content to the rival argument herein and the court, is of the opinion that as submitted by the respondent, a proper construction of the provision is that the principle applies where the issues in controversy have been finally determined and it does not apply to situations where issues in controversy have been disposed off on points of technicality. Herein since the application on the basis of which the allegation of Resjudicata was based had been struck out, on technicalities, it cannot be said to have been decided on merit. For this reason the objection on the basis of Resjudicata also fails.

Turning to the respondent, it is on record that counsel for the Respondent raised the issue of locus standi on the part of the plaintiff championing their rights herein and even cited case law to support the stand. This court, declines to make a pronouncement on the issues because it was only raised from the bar in the first instance. In the second instance since there is a judgement in place, the respondent can only gain locus standi to raise these issues only after the matter has been re-opened for them to gain locus standi and then raise the same either as a preliminary objection or by way of an application.

For the reasons given above the preliminary objection is dismissed with costs to the respondent to it.

DATED, READ AND DELIVERED AT NAIROBI THIS 12TH DAY OF JUNE 2009.

R.N. NAMBUYE

JUDGE