



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Suit 374 of 2008

VERONICAH GATHONI NGIGE.....PLAINTIFF

VERSUS

SALOME WANJIKU KARIA.....DEFENDANT

RULING

This is an application for summary judgment. The Plaintiff's case is that she is the registered proprietor of all that piece of land situate in Nyandarua and known as **Title No. Nyandarua/ Nandarasi/ 854** (the suit land). She claims that despite the dismissal, in Nyahururu PMCC No. 188 of 2003 (the previous suit), of the defendant's claim to the suit land as well as the appeal arising there from, the defendant has refused to vacate the suit land. She therefore claims for an order to evict her.

The defendant on the other hand claims that she bought 2 acres of that land from the plaintiff's father and asserts her right to occupy it. Her defence to the plaintiff's claim in this suit, if I understand it, is that the plaintiff having not counter-claimed for eviction in the previous suit the matter is res judicata and the plaintiff is now estopped from seeking her eviction. She therefore strongly opposes this application on the ground of res judicata which she says is a triable issue that should go to trial.

The purpose of **Order 35 of the Civil Procedure Rules** was stated by Newbold, P in the case of **Zola and Another Vs Ralli Brothers Ltd. and Another [1967] EA 691 at page 694** to be:-

“intended to enable a Plaintiff with a liquidated claim, to which there is clearly no defence to obtain a quick and summary judgment without being unnecessarily kept from what is sue to him by the delaying tactic of the Defendant.”

Delay even by the very nature of the administration of justice may enable the plaintiff to obtain summary judgment. Madam J.A. alluded to this when he stated in **Continental Butchery Ltd Vs Samson Musila Nthiwa Civil Appeal No.35 of 1997 (unreported)** that:-

“With a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the court is empowered to enter judgment for the ... plaintiff under the summary procedure provided by Order 35 subject to there being no bona fide triable issue which would entitle a Defendant to leave to defend”.

The powers given to the court under the summary procedure are draconian, coercive and drastic. And because a party may thereby be deprived of his right to a plenary trial, the court should exercise those powers with the greatest care and circumspection and only in the clearest of cases as regards the facts and the law when there is plainly no defence. Lord Halsbury in **Jacobs Vs Booths Distillery Company 85 L.T. Reports at page 262** stated that such occasions arise when the case is plain. In his words:-

“There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it was not in aid of justice that such things should continue, Order XIV [equivalent to our Order 35] was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who are endeavoring to enforce their rights”.

In **Industrial and Commercial Development Corporation Vs Daber Enterprises Ltd [2000] 1 E.A. 75 at page 76** the Court of Appeal stated:-

“Unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination. ... The purpose of the proceedings in an application [under Order 35 is to enter] summary judgment where there is plainly no defence to the claim. ... Where the Defendant’s only suggested defence is a point of law and the court can see at once that the point is misconceived or, if arguable, can be shown shortly to be plainly unsustainable, the plaintiff will be entitled to judgment. The summary nature of the proceedings should not, however, be allowed to become a means of obtaining, in effect, an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable”.

Where the matter is plain and obvious the court is under duty to enter judgment for the Plaintiff. In **Anglo Italian Ban Vs Wells, 38 L.T. at page 201** Jessel, M.R. stated that:-

“When the judge is satisfied that not only there is no defence but no fairly arguable point to be argued on behalf of the Defendant it is his duty to give judgment for the Plaintiff”.

Where, however, the defence is “reasonable or plausible, and bona fide, the judge has no discretion; the Defendant is entitled to unconditional leave to defend”. – **City Printing Works (Kenya Ltd. Vs Bailey [1977] KLR 85 at page 88**. Where even one triable issue is the court has no discretion and must grant unconditional leave to defend. See **Osodo Vs Barclays Bank International Ltd. [1981] KLR 30** and **Postal Corporation of Kenya Vs I.T. Inamdar & Others, Civil Appeal No.189 of 2001**.

In order to decide whether or not there is an arguable defence the court must look at the whole of the Respondent’s replying affidavit and defence – **Insurance Co. Ltd. Vs Waruinge & 2 Others [2003] KLR 629** following **Kirat Singh & Co. Vs P. Mughji (1952) 19 EACA 33**.

As I have pointed out, the defendant’s main defence is that this matter is res judicata. To see how that defence arises, it is important to recap on the proceedings in the previous suit.

The plaintiff’s case in the previous suit was that her late father gave her a piece of land which was then unregistered. After her father’s death, she got the land registered in her name in what she claims was a first registration.

The defendant on the other hand claimed that she had bought 2 acres of the suit land (the portion) from the plaintiff’s father but it is not clear from the proceedings of the previous suit when that was done. It would appear she took possession pursuant to that sale. On realizing that the Plaintiff had obtained Title to the whole land the Defendant filed the previous suit alleging that the Plaintiff had obtained Title by fraud. After hearing the case the court found that she had not established fraud and dismissed her claim holding further that the Plaintiff’s claim based on inheritance had been proved. The Defendant’s appeal to the High Court was also dismissed. She claims she wants to pursue the matter to the Court of Appeal and she has filed a notice of appeal but that appeal has not been heard leave alone filed.

As the defendant is still in possession of the portion, the Plaintiff has filed this suit and sought her order of eviction. If I understand the defendant’s defence well, her claim is that the Plaintiff having not counter-claimed for her eviction in the previous suit this matter is res judicata. The issue therefore is whether this matter is re judicata as the defendant claims. If it is and the plaintiff has no chance of success

in this suit then I should dismiss this application.

The doctrine of res judicata is a rule of the conclusiveness of judgments based partly on the maxim of Roman jurisprudence “*Interest reipublicae ut sit finis litium*” (it concerns the state that there should be an end to law suit), and partly on the Latin maxim “*Nemo debet bis vexari pro una at eadam causa*” (no man should be vexed twice over for the same cause). The general doctrine is founded on consideration of high public policy to achieve two objectives namely that there must be a finality to litigation and that the individual should not be harassed twice over with the same account of litigation. It means that the parties should be estopped from litigating on an issue that has been definitively settled by judicial decision. It is also an affirmative defence barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or a series of transactions that could have been-but was not-raised in the first suit.

It is well known that the principle of re judicata is a mixed question of fact and law. It has to be specifically pleaded and the party relying on it should place before the court all the material particulars which would be sufficient to give a finding whether a particular case is barred by its principles.

Section 7 of the Civil Procedure Act has enacted the doctrine of res judicata in the following terms:-

“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 of competent jurisdiction to try any such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

From this provision, it is clear that there are three essential elements in the doctrine of res judicata. They are (1) an earlier decision on the issue, (2) a final judgment on the merits by a court of competent jurisdiction, and (3) the involvement of the same parties, or parties in privity with the original parties.

In this case there is no dispute that the said Nyahururu PMCC No. 188 of 2003 was a previous suits between the same parties on the matter and that it has been finally decided by a court of competent jurisdiction. As I have said the appeal arising there from has also been dismissed. It is also not in dispute that the issue of the defendant’s eviction from the suit land was not placed before the trial or appellate courts for determination. In raising res judicata as her defence, the defendant is relying on Explanation 4 to Section 7 of the Civil Procedure Act which provides that:-

“Any matter which might or ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

Expounding on this Explanation in Henderson – Vs – Henderson (1843) 67 ER 313, 319, a dictum which the Privy Council described as the *locus classicus* of this aspect of *res judicata* in Yat Tung Investment Co. Ltd – Vs – Dao Dao Heng Bank Ltd (1975) AC 581, 590, Wigram V-C, stated:-

“...where a given matter becomes the subject of litigation in an adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea *res judicata* applies, except in special cases, 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 of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

As I have pointed out, the defendant’s argument is that the plaintiff having not counter-claimed for her eviction in the previous suit, she is now estopped from doing so and her present application should be dismissed.

Having considered the matter I find that the Defendant's defence of res judicata is indeed a substantial triable issue in this case. It is clear from the plaint in the previous suit, which has been exhibited in this application, that the defendant (who was the plaintiff) sought an injunction to restrain the plaintiff (who was the defendant) from interfering with her occupation of the suit land. I agree with the defendant's counsel that she should have counter-claimed for the defendant's eviction in the previous suit.

With this finding, I should, logically, dismiss this application but to do that will not do justice to the parties. I say this for three reasons. First and foremost, the Defendant did not obtain consent of the area Land Control Board. The alleged sale transaction she is basing her claim on is therefore void for all purposes under Section 6 of the Land Control Board. Secondly, the defendant's claim to the suit land has been dismissed by the Principal Magistrate's court and on appeal by this court (Hon. Justice Mugo). The latter as a matter of fact held that the defendant's continued occupation of the suit land has no legal basis. Thirdly, it is the policy of the court that in each case the overriding objective of the court should be to do justice to the parties and bring each matter to its logical conclusion. To allow the defendant to cling to the issue of res judicata in this case when it is clear that the previous case has been decided against her and that her defence will lead to endless litigation in the matter will, in my view, defeat the very objective of that principle of res judicata that she is relying on.

For these reasons, I allow this application and enter summary judgment for the plaintiff. As the defendant has been on the suit piece of land since 1999, I think she requires reasonable time to arrange to vacate. In the circumstances, I order that the defendant shall vacate the suit land within six months failing which she shall be evicted. Given the circumstances of this case I order that each party shall bear its own costs of this case.

DATED and delivered this 25th day of September, 2009.

D. K. MARAGA

JUDGE.