



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 422 of 2007**

**JOSEPH NJOGU NJUGUNA**

**JANE NYAMBURA NJOGU.....  
PLAINTIFFS**

**VERSUS**

**TETRA PAK LIMITED .....  
DEFENDANT**

**R U L I N G**

Preliminary Objection filed and dated 22/5/2009 seeking dismissal of the suit on the ground that it is *res judicata* in view of **HCC No.516/02 – Joseph Njuguna vs. Tetra Pak & 2 others** where similar issues were determined. (2) Hearing of this suit may be stayed pending the hearing and determination of other suits –

- (a) HCC No.1694 /01 – Joseph Njuguna & another vs. Aberdare Creameries and Tetra Pak;**
- (b) HCC 1661/02 at Nairobi.**

This suit seeks for special damages for which requisite fees should be paid. The plaintiffs have filed submissions and highlighted the following point. He quotes Mulla on Code of Civil Procedure which is similar to our **Section 7 of Civil Procedure Act** requires:-

- (a) *That the matter should be directly and substantially in issue in the subsequent suit;***
- (b) *Former suit must have been suit between the same parties;***
- (c) *Litigating under the same title;***
- (d) *Decided by a court of competent jurisdiction;***
- (e) *The matter directly and substantially in issue in subsequent suit must have been heard and finally decided.***

He relies on the case of **Nguyai vs. Ngumayu [1985] KLR 606**. Muli, J. held that if parties to the suits are different then the doctrine of *res judicata* is not applicable. In this case the two plaintiffs are husband and wife and were joint common owners of suit property. They should have been present at all suits concerning the suit property. However, 2<sup>nd</sup> plaintiff had donated a power of attorney to the first plaintiff, her husband.

It is submitted that the matter at issue must be directly and subsequently in issue in the first suit. However, explanation No.4 states any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and subsequently in issue in that suit. Therefore, the issues of damage for wrongful sale ought to have been raised in that suit No.516/2002. The plaintiffs relies on the case of **Mwanthi vs. Imanene [1982] KLR 232.**

For the defence the counsel relies on the case of **Gichuki vs. Gichuki [1882] e KLR** Civil Appeal where the Court of Appeal held:-

***“The dispute involving the same parties the same cause of action had previously been adjudicated by a court of competent jurisdiction and no appeal was brought against that decision so that res judicata applies.”***

Counsel also relied upon the decision in the case of **Salem A.H. Zaid vs. Finad H. Huneidan** where the court observing that:-

***“It is well settled of a claim under Order XVII Rule 3 on account of the plaintiff’s default in producing evidence to substantiate his case has the same effect as a dismissal founded upon evidence and that the subject matter of that will be res judicata.”***

In the case of **Benjo Amalgamated & another vs. Kenya Commercial Bank Ltd. [2006] e KLR,** also the issue of *res judicata* was discussed and **Kanorero River Farm & 3 others vs. National Bank of Kenya [2002] e KLR.**

I have not had the opportunity to read the pleadings in the suits said to have been filed in regard to the subject matter. But from what is stated by both parties, it appears that are **HCC No.516/02 – Joseph Njuguna vs. Tetra Pak & 2 others,** **HCC No.1694/01 – Joseph Njuguna & another vs. Aberdare Creameries & Tetra Pak** and **HCC No.1661/02** and this **HCC No.422/2007 – Joseph Njogu Njuguna & another (his wife) vs. Tetra Pak Ltd.** are still pending.

The subject matter is the suit property known as L.R. No.1/149 Nairobi. It is clear the plaintiffs intend to litigate in installments which is an abuse of court process. However, there is no evidence that there is any of these suits which is heard and finally determined. It is also clear that the parties are not the same in all these suits. I am therefore of the view that the principle of *res judicata* does not apply.

However, the provisions of **Section 6** of the **Civil Procedure Act** is applicable. I dismiss ground number 1 of Preliminary Objection but uphold ground 2. I order that all other suits now not finally heard and determined finally be and are hereby stayed until the plaintiffs shall prosecute to the end this suit namely; **HCC No. 422/2007** at Milimani.

The costs of this application shall be in the cause.

It is so ordered.

**DATED, SIGNED and DELIVERED** at Nairobi this 9<sup>th</sup> day of October 2009.

**JOYCE N. KHAMINWA**

**JUDGE**