REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 285 OF 2009

PAUL IMISON…… PLAINTIFF

VERSUS

JODAD INVESTMENTS…….DEFENDANT

RULING

The defendant filed the present application present application pursuant to provisions of **Order VI Rule 13(1)(b) (c) & (d)** of the **Civil Procedure Rules** seeking to have the plaintiff's suit struck out with costs. The application is supported by the annexed affidavit of Calvin Harold Cottar, a director of the defendant and the grounds stated on the face of the application. The application is opposed. The plaintiff, Paul Imison filed a replying affidavit in opposition to the application.

At the hearing of the application, I heard rival submissions made by Mr. Ongicho for the defendant and Mr. Nyaanga for the plaintiff. Mr. Ongicho argued that the suit was *res judicata* in light of the fact that there was a previous suit filed by the defendant against the plaintiff (i.e. Nairobi HCCC No. 693 of 2000). He explained that in the previous suit, the plaintiff had filed a defence and a counterclaim. The matter was fully heard by Ibrahim J who after hearing the parties delivered his judgment. According to the defendant, since the plaintiff had counterclaim for damages in the previous suit, and since the court had made a finding in his favour, it was not open for the plaintiff to file another suit. Mr. Ongicho submitted that since the judge had directed that damages be assessed by a judge of this court, the only way the plaintiff could assess his damages is in the suit that the order was issued and not by filing a separate suit. It was the defendant's case that in so far as the plaintiffs claim was on the basis of the decision of Ibrahim J, the same was *res judicata*. It was its view that the present suit contravened the provisions of **Section 7** of the **Civil Procedure Act** and **Order II Rule 1(2)** of the **Civil Procedure Rules**. He argued that the plaintiff should not be allowed to litigate his case by installments. He urged the court to find that the present suit was filed in abuse of the due process of the court and should therefore be struck out. He relied on the decision of **Pop-In (K) Limited & Others vs Habib Bank A.G. Zurich CA Civil Appeal No. 80 of 1988.**

Mr. Nyaanga for the plaintiff opposed the application. He relied on the plaintiff's replying affidavit in support of the plaintiff's case. He submitted that the present suit was founded on the decision of Ibrahim J which directed that an inquiry be made on the damages that are to be paid to the plaintiff as a result of the interlocutory injunction that was granted pending the hearing and determination of the suit. He explained that the plaintiff intended to call evidence from quantity surveyors who will present their bill of costs. He argued that the plaintiff decided to file the present suit with a view to enabling the plaintiff to adduce

evidence in support of his claim for special damages. He urged the court to dismiss, the application as he was of the view that the suit was not *res judicata.*

I have read the pleadings filed by the parties to this application in support of their respective positions. I have also carefully considered the submissions made by counsel for the plaintiff and counsel for the defendant. The issue for determination by this court is whether the plaintiff's suit is *res judicata* and therefore ought to be struck out with costs. **Section 7** of the **Civil Procedure Act** is clear on the circumstances under which the court will bar a litigant from filing another suit to litigate on issues between the same parties which have been heard and determined by a court of competent jurisdiction. The court of Appeal in **Pop-in (K) Ltd & Others vs Habib Bank A.G. Zurich CA Civil Appeal No. 80 of 1988** held at page 4 of its judgment as follows:

> *"On the application of res judiata, appellant's main and final position is well within the decision in **Yat Tung Investment Co. Ltd vs Dao Heng Bank Ltd and Another 1975 A.C 581** as is clear from the following passage which repays quotation:*
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> *`But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res judicata is the judgment of Wilgram V.C. in **Henderson vs Henderson (1843) Hare 100, 115,** where the judge says:*
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> *`Where a given matter becomes the subject of litigation in, and of 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 matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because the have, from negligence, inadvertence, or even accident omitted part of their case. The plea of re judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form a opinion and pronounce 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."*

In the present application, it is not disputed that Ibrahim J in HCCC No. 693 of 2000 did order that an inquiry be made in regard to the appropriate damages that should be paid to the plaintiff as a result of the undertaking that the defendant had given when the interlocutory injunction was granted in favour of the defendant as against the plaintiff prior to the hearing and determination of the suit. Ibrahim J observed in the penultimate page of his judgment as follows:

> *"From the findings of this court hereinabove, I do hold that the defendant has been substantially successful in this suit. The court on 14th June 2000 granted the injunction orders against the defendant on condition that the plaintiff would file an undertaking as to damages within 10 days of the order. The plaintiff duly complied and filed the written undertaking. The plaintiff has ever since enjoyed the said orders and the defendant has been restrained from entering the, suit property and the construction and developments were put on hold since 14th June 2000. The defendant was bound to obey these orders and in his amended defence and counterclaim included a prayer of the injunction to the plaintiff. In its discretion, this court directed that the question of inquiry as to damages which might have been occasioned by the grant of injunction await the judgment herein. In my view, this was proper thing to do since it would have been premature, pre-emptive and prejudicial for there to be an inquiry in this regard before the issue of "liability" had been decided. This court has the power and jurisdiction to make the inquiry even after*

judgment such it was a condition for the grant of the injunction order."

It was after making this finding that the learned judge ordered inquiry to be made on the damages that were to be paid to the plaintiff. In that respect, it was evident that the cause of action in regard to the damages that are to be paid to the plaintiff arose from the moment the court reached a finding that the defendant was required to honour the undertaking that it had given that it would pay damages to the plaintiff in the event that a finding was reached by the court that the grant of interlocutory injunction pending the hearing of the case was undeserved. The foundation of the plaintiff's cause of action in regard to the damages that he is to be paid is the exercise of discretion by the court in directing the defendant to give an undertaking as to damages. It can therefore be said that the cause of action in regard to the said damages arose the moment the court reached a finding that the grant of interlocutory injunction was without leggy foundation and in the circumstances the defendant was bound ay damages to the plaintiff.

Was the issue of damage a matter in issue between the plaintiff and the defendant, in the previous suit? I do not think so. From the decree extracted from the judgment of the court, it was clear that the matter issue was substantially in regard to the validity or otherwise of the sale agreement dated 28th July 1998 between the plaintiff and the defendant. The sale agreement was in respect of land known as LR. No.1160/575. The court found in favour of the plaintiff in that suit. The issue of damages was of substantially in issue during the trial of that suit. It only arose after the court reached a finding that the plaintiff was entitled to be paid damages. Once a decision had been made that the plaintiff was entitled to have an inquiry made as to damages, the plaintiff had no choice but to file a different suit. It is trite that a court of law cannot take evidence in respect of a matter which has not been pleaded. The issue in regard to the quantum of damages that the plaintiff is to be paid cannot be determined without the plaintiff pleading to the same. It was legally impossible for the plaintiff to amend his defence and counterclaim (in the previous suit) after the court had rendered its judgment. The plaintiff can only plead his claim in a new suit. This suit is al consequence of what took place after the previous suit had been filed.

In the premises therefore, hold that the. resent suit is not *res judicata* since the matters in dispute in the present suit are completely different with the matters in dispute in the previous suit (Nairobi HCCC No.693 of 2000). I further hold that the cause of action in the present suit was the decision of Ibrahim J in the previous suit which, entitled the plaintiff to be paid damages on account of the undertaking that the defendant had given when it was granted orders of interlocutory injunction pending the hearing and determination of the previous suit. The defendant's application lacks merit and is hereby dismissed with costs.

DATED AT NAIROBI THIS 25TH DAY OF NOVEMBER 2009

L KIMARU

JUDGE