



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 57 of 2007

URSULA HOMPPLAINTIFF

VERSUS

PETER MUSAU KITUKUDEFENDANT

R U L I N G

By a notice of Preliminary Objection dated 29th February 2008, the defendant herein applied for the entire suit to be struck out on the basis that the same is Res judicata in view of the consent order recorded on 27.2.2006 in Mombasa. H.C.C.C. No. 278 of 2004. It is the argument of the defendant that the issues raised in this case should have raised in H.C.C.C. No. 278 of 2004.

The plaintiff is of the view that the principle of res judicata does not apply here because Mombasa H.C.C.C. No. 278 of 2004 had been withdrawn. It is the argument of the plaintiff that the defendant had the option of applying to set aside the consent order or file a fresh suit. In this case, the plaintiff chose to file a fresh suit instead.

What provoked the filing of the notice of Preliminary objection is the consent order of 27.2.2006 in Mombasa H.C.C.C. No. 278 of 2004 which read in part as follows:

“1. That this suit be withdrawn without costs.

2. That the names in the title deed to the suit property be changed to read either of the parties to the suit as will be agreed between them. “

In the plaint filed in this suit the plaintiff seeks for the following orders inter alia: an order for rectification of the register by directing any registration earlier on effected on the said title no. Kwale/Diani Complex/1050 be recalled and cancelled to reflect the plaintiff herein as the registered owner. In fact in paragraph 13 of the plaint dated 22/3/2007, the plaintiff avers as follows:

“13. That the plaintiff who initially filed a suit against the Defendant in H.C.C.C. No. 278 of 2004, withdrew the suit when the Defendant misrepresented to her that he was willing to relinquish his claim over the suit property and let her have possession and absolute proprietorship or ownership of the same to the exclusion of the Defendant which fact was not true inferring from the defendant’s subsequent fraudulent conduct.”

In response at paragraph 10 of the defendant’s defence, the defendant states as follows:-

“10. the consent recorded in the earlier suit did not put the property in the sole name of the plaintiff

either as alleged in the plaint or at all.”

Can it be said that from the above excerpts that the principle of res judicata has been established? My answer to the above question is in the negative. The issues raised in this suit though inter-related to those raised in Mombasa H.C.C.C. No. 278 of 2004 cannot be said to have been heard and determined in H.C.C.C. No. 278 of 2004. At some stage, this court will be required to interpret the effect of the consent order recorded in H.C.C.C. No. 278 of 2004. That in itself does not make this suit res judicata. In the end I see no merit in the Preliminary Objection which I hereby dismiss with costs to the plaintiff.

Dated and delivered at Mombasa this 8th day of April 2008.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Tindi for plaintiff

Wameyo for defendant.