



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

**Civil Suit 317 of 2007**

**PRABHULAL TEJPAL HARIA.....1<sup>ST</sup>  
PLAINTIFF/RESPONDENT**

**MRS. MANJU PRABHULALA HARIA.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**PRAVINCHANDRA MEGHJI DODHIA.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**MRS. REKHA PRAVINCHANDRA DODHIA.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**BHAVISHA PROPERTIES LIMITED.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**R U L I N G**

The application is one dated 14<sup>th</sup> August, 2008 brought under section 7 and 8 of Civil procedure Act, order VI rule 13(1) (b) (c) and (d) of the Civil Procedure Rules and the Limitations of Actions Act. No section of Limitations of Actions Act is quoted. It seeks to have the Plaintiff's suit against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant struck out. The basis for the application are given namely:

- 1. The Plaintiffs suit is time barred.**
- 2. The Plaintiffs suit is *res judicata*, the same issues having been tried and determined in Misc. Application No. 663 of 2005 Prabhulal Tejpal Haria & Manju Prabhulal Haria versus Pravinchandra Meghji Dodhia, Rekha Pravinchandra Dodhia, Bhavisah Properties Limited.**
- 3. The suit is frivolous and an abuse of the process of Court.**

The application is supported by affidavits sworn by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. I have considered the same.

This application is opposed. The 2<sup>nd</sup> Plaintiff has sworn an affidavit on her behalf and that of the Plaintiff Company dated 13<sup>th</sup> October, 2008. I have considered the contents of the affidavit.

The Applicants' contention is that the suit against them is time barred and *res judicata* and so ought to be struck out.

Regarding the issue of the suit being *res judicata*, Mr. Gitau for the Applicants contends that the current suit is remarkably the same as **Misc. C.A. No. 663 of 2005**, which is 'PMD2' in the Applicant's

annexure. Counsel expounded that the similarity in both suits were in the facts of the two cases, the parties to the suit, the claims and the issues in both suits. Counsel relied on section 7 of the Civil Procedure Act and in the cases of **Abdul Said & Others vs. National Bank of Kenya HCCC No. 527 of 2004** and **David Kamau vs. Savings & Loan (K) Limited, HCCC No. 1112 of 2007**. In the latter case Okwengu, J. struck out the Plaintiff's suit for non disclosure of the existence of a previous suit between the parties.

Ms. Mwangi for the Respondent in response submitted that the Applicants had misunderstood the nature of the Originating summons. Ms. Mwangi argued that the Misc. Application was brought under section 118 of the Companies Act only for the purposes of rectification of the company register and that the said procedure was adopted when the facts are not controverted. Counsel submitted that Warsame, J. dismissed the Originating Summons for reasons controverted issues which could not be determined at that stage had been raised. Counsel argued that in dismissing the Originating Summons, the learned Judge did not determine the merit or otherwise of the case. Counsel relied on the matter of **Nyakio Investment Limited, In the Matter of Companies Act, Winding Up Cause No. 20 of 2007**, at pages 9 and 10 where Khaminwa J. sets out the rules which govern the doctrine of *res judicata* as follows.

***“1. Matter must directly and substantially be in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit.***

***2. the former suit must have been between same parties or between parties under whom they or any them claim.***

***3. the parties must have litigated under the same title in the former suit.***

***4. the court which decided the former suit must have been a court competent to try the subsequent suit.***

***5. the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit.”***

These are the principles applicable to test whether a case is *res judicata* and I am guided by them. There is no dispute that the two suits, **Misc, 663 of 2005** and the instant one are between the same parties and are substantially similar. The only disputed fact is whether the Misc. application was heard on the merit and determined. That is the issue for determination on this question of whether this suit is *res judicata*.

I have carefully read the ruling of my brother Warsame, J. in **Misc. C.A. No. 663/05**. The ruling is annexure ‘MPH1’ to the Respondent’s replying affidavit. The learned judge at page 8 of the same ruling concluded thus:

***“The issue of title to the shares and the suit property cannot be appropriately decided at this stage on the heavily contested facts and documents.***

***The procedure adopted by the Applicants to remedy the alleged acts committed in 1991 cannot be an expedient method to address those grievances. It is therefore my position that the application is premature and cannot remedy the grievances put forward by the Applicant. I do not think it is appropriate for me to invoke my discretionary powers in favour of the Applicants at this stage. The facts and issues are not clear to me and it would be grave injustice to order rectification on affidavit evidence. It is therefore my view that the summary powers of the court cannot be invoked when the issues in dispute are not plainly clear. I refuse to exercise my discretion in favour of the Applicants.”***

The learned judge declined to determine the issues in the Originating Summons and declined to make any orders in the suit. To put the matter to rest, the learned judge declined to determine any issue under section 118 of Companies Act because in his view *“the powers under section 118 of the Companies Act cannot be invoked when there is a real and complicated dispute as to the real interests of the parties.”* Even though the learned judge used the term “dismissed”, it is clear that he declined to determine any of

the issues raised in the Originating Summons.

It is quite clear that even though the parties in both suits are the same and that the matters were substantially similar, the previous suit was not heard and determined on the merits. I find and hold that this suit is not *res judicata* and therefore that plea is not available to the Applicant.

The minor issue raised that the Respondent failed to disclose that there had been a previous suit in the plaint herein is misconceived and is a question of semantics. What the Plaintiffs stated that “*there is no pending suit between the Plaintiffs and the Defendants...*” was in fact true.

The second ground I will consider is the one regarding the suit being time barred. Mr. Gitau argued that the Plaintiffs’ case lies in the tort of conversion in which case the suit ought to have been filed within 3 years from the date the cause of action arose. Counsel relied on section 4(1) of the Limitations of Actions Act. Counsel submitted that since the offence was committed in 1991, and the Plaintiff alleges he discovered it in 1996, the suit was time barred by 2001 when it was filed.

Mr. Gatau relied on the case of **Mbithi vs. Municipal Council of Mombasa & Anor. [1992] LLR 2235** for the proposition that ignorance of law, in this case ignorance of the period of limitation period for bringing the action, is not a defence.

Ms. Mwangi for the Respondents did not agree that the Plaintiffs’ claim lies solely on the tort of conversion. Counsel submitted that rather it was based on breach of trust by the Defendants through fraudulent acts leading to rectification of the Company records at the Companies Registry. Ms. Mwangi contended that the applicable law was section 20(b) of the Limitation of Actions Act and that the suit was not in the circumstances statute barred. Counsel relied on the case of **Ndagara Companies Limited vs. Paul Kibugi Muite & 2 Others. HCCC No. 590 of 2003** for the proposition that a claim based on trust is not time barred by virtue of section 20(b) of the Limitation of Actions Act.

Section 20(1) (b) and (2) of the Act stipulates:

***“20. (1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action –***

***(a) ....***

***(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.***

***(2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period of limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date on which the right of action accrued.”***

If the intention of the Plaintiffs is to recover trust property by virtue of being beneficiaries, then the suit is within the limitation period.

I have perused the plaint filed herein. I do not see a specific statement that boldly declares that the suit is brought for purposes of recovering beneficial interest under a trust. Neither is there a prayer for a declaration for a trust. Neither are particulars of trust provided. There is however a veiled reference to breach of equity and of duty pleaded in paragraph 14 of the plaint, which are an indicator that breach of trust is contemplated. I am mindful that failure to plead trust, or particulars of breach of trust and, failure to seek a declaration of trust in the plaint, is a serious defect in the pleadings. This defect is however curable by amendment. It is however demurrable. I leave it at that.

It is my view that in light of my finding herein above, there is sufficient reason to believe that the Plaintiff’s claims also lies in trust. That being so, the Plaintiffs’ suit cannot be said to be statute barred.

**The application to strike out the Plaintiff's suit for being *res judicata*, statute barred and an abuse of court process is in the circumstances without merit. In the result, the Defendants Chamber Summons dated 14<sup>th</sup> August, 2008 is dismissed with costs.**

**Dated at Nairobi this 5<sup>th</sup> day of December, 2008.**

**LESIT, J.**

**JUDGE**

**Read, signed and delivered in presence of:-**

Mr. Gitau for the Applicants

Mr. Anzala holding brief Mr. Anzala holding brief Ms. Mwangi for the Respondents

**LESIT, J.**

**JUDGE**