



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

**Civil Case 45 of 2006**

**OMARI IFIRE**

**JOSEPH MUSULA MSIMBA**

**OSUNDWA YOHANA**

**AMIDA MUKASA SAKASA**

**SHEBA**

**MAKOKHA.....PLAI  
NTIFF/APPLICANT**

**V E R S U S**

**THE TOWN CLERK MUMIAS**

**MUNICIPAL**

**COUNCIL.....DEFEN  
DANT/RESPONDENT**

**R U L I N G**

When the Chamber Summons application dated 22/5/06 by the Plaintiffs/Applicants came up for hearing before me on 10/7/2006, Mr. Ombito, learned counsel for the Defendant, raised a preliminary objection on a point of law in which he contended that the suit was res judicata because the issues raised in the plaint and the remedies sought had been determined in Kakamega HCCC No.220 of 1995 in which no appeal was preferred or review made. He urged the court to dismiss the suit. But if the suit is res judicata, perhaps it ought to be struck out. But no matter.

In the replying affidavit sworn on 8<sup>th</sup> May, 2006 by one Hannington Maina, the Defendant's legal officer attached to the office of the Town Clerk of the Defendant, the latter averred that the issue of chamber summons application dated 22/5/06 was bad in law as the issue ownership of the parcel of land referred to had been determined. The said deponent annexed a copy of Chamber summons dated 28-6-04 filed in suit number HCCC No.220 of 1995 in Kakamega in which Messrs Juma Mombo Opetu and Musa Ambasi Ekombe were the two plaintiffs while the Attorney General, Mumias Town Council, and Registered Trustees of Full Gospel Churches of Kenya were the Defendants. No plaint was however annexed and it is not possible to discern with certainty the remedies sought in the suit. However, the proceedings, a copy of which was attached, show that the said suit (No.220/95) was struck out on 3/5/03 on the ground that it lacked "merit."

The suit herein (No.45 of 2006) was commenced by Messrs Omari Ifire, Joseph Musula Masimba, Omida Mukasa Sakasa, and Makokha against the Town Clerk of Mumias Municipal Council and the subject matter is the number of parcels of land in Mumias Municipality known as S. Wanga/Ekero/873, 620, 637, 652 and 638 which the plaintiffs claim are legally owned by them. A declaration to that effect

and an order to cancel “subsequent titles created” in respect of these parcels is sought.

Mr. Munyendo, learned counsel for the Plaintiffs, termed the preliminary objection premature because the defendant had not filed defence to the suit. It was his contention that there was no evidence that there was no evidence that the issues determined in Kakamega HCCC No.220 of 1995 were the same as those in the suit herein. He urged the court to dismiss the preliminary objection.

I have perused the affidavit filed in reply to the application on the defendant’s behalf and its annexures. I have also considered the arguments advanced by both counsel. Mr. Ombito, learned counsel for the defendant/respondent did not file a Notice of Preliminary objection but what emerged as the main thrust of the point of law he raised was that the suit herein is res judicata. Firstly, none of the four plaintiffs/applicants in the suit herein was a party to the suit No. Kakamega HCCC. No.220 of 1995. Only the defendant herein was a party as one of the three defendants to that suit. Secondly, the said suit (No.220/95) was struck out. It was not shown that the issues in that suit were the same as those in this case.

I observe that the suit (No.220/95) was struck out on technicality and was not heard on merit although it was stated that it was dismissed because it lacked merit. It is important to keep in focus the fact where a suit has been dismissed on a preliminary point it cannot be said that the plaintiff has had an opportunity of being heard on the merits and the matter cannot therefore be res judicata any more than a default judgment would constitute res judicata although in the latter case a fresh suit may be barred under Order IX of the Civil Procedure Rules. But where a suit is dismissed on failure to produce evidence that is a decision on the merits which gives rise to res judicata. It is axiomatic that a preliminary objection raises a pure point of law and is argued on the assumption that all the facts pleaded by the other side are correct. “It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”, see *MUKISA*

*BUSCUIT CO. v. WEST END DISTRIBUTORS [1969] EA 696.* Needless raising of preliminary points or objections which do not conform with this principle end up wasting valuable judicial time. But this is not to say advocates must be fazed or shy away from raising preliminary objections where it is merited.

I find no merit in the preliminary objection. It is hereby dismissed with costs.

***Delivered, dated and signed at Kakamega this 5<sup>th</sup> day of October, 2006***

G. B. M. KARIUKI

J U D G E