



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT ELDORET

HCCC.NO.175 OF 2001

JAMES MSABAKWA CHERABA ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

LAXMANBHAI CONSTRUCTION CO.LTD. ::::::::::::::::::::::::::::::::::::::: DEFENDANT

R U L I N G

This is an application brought under section 3A, 7 and 8 of the Civil Procedure Act dated 6th September 2001. It is supported by an affidavit sworn on 6th September 2001 by Ben Kipkosgei Murei an advocate of the High Court of Kenya. The application seeks for orders that the suit herein i.e Eldoret High Court Civil Suit No.175 of 2001 be dismissed as being resjudicata vide Nairobi CMCC No.10739 of 1999.

. At the hearing of the application the respondent was not represented. I note that the application was fixed for hearing at the registry on 19th December 2003 in the absence of the respondent or his counsel. There is no record that the respondent's counsel M/s Kipsei Kitony & Co. Advocates were served with a hearing notice. The latest affidavit of service that I see in the file, is one dated 10th April 2003, sworn by Ken Nyaundi advocate that he had prepared a hearing notice on the 4th April 2003 and served on Ledisha J. K. Kitony & Company Advocates. Even that affidavit of service does not enclose the copy of the hearing notice that was said, in the affidavit, to have been stamped and signed to acknowledge receipt of served documents. The respondent's advocate should have been served with a hearing notice, as they were not a party to the fixing of the hearing date for 23rd March 2004

On the application before me, Mr. Tuiyot for the applicant submitted that they were seeking dismissal of the suit as it was res-judicata Nairobi CMCC No.1073 of 1999. He submitted that the parties in the two cases are the same, the date of accident is the same, the particulars of injuries are the same and the Nairobi case has been determined and cheques had already been paid. He submitted that payment had been effected 7 months before this suit in Eldoret was filed.

Having perused the documents in the file, it is clear that the two suits are by the same parties, and the claim is the same or it arises from the same incident. There are attached photocopies of cheques from Kenindia Assurance Co. Ltd. dated 3rd January 2001 for Kshs.75,600/= and Kshs.55,530/= payable to James Msabakhwa Cheraba and Odiwuor Okelo & Co. Advocates. However there is nothing attached to show a decision of the court determining the rights of the parties in the matter.

Section 7 of the Civil Procedure Act requires that the matter should be heard and finally decided by the court for it to be res-judicata. The applicant has not indicated to me when and on what terms the matter was finally decided by the court. It is for the applicant to show this court that the matter has been finally decided, in order to justify a ruling from the court that the matter is res-judicata. The applicant has failed to provide particulars to the court to establish whether the matter was finally decided and when. This application therefore must fail.

For the above reasons, I dismiss the application. As the respondents did not appear at the hearing of the application, I make no order as to costs.

Dated and delivered at Eldoret this 28TH . Day of APRIL 2004.

George Dulu

Judge

Delivered in the presence of :- **Katwa for applicant**

*(I certify this a true copy of the original)*

**DEPUTY REGISTRAR**