



REPUBLIC OF KENYA

THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL CASE 607 OF 1991

COLORAMA PROCESSING LAB LTD PLAINTIFF

VERSUS

BURHAM GULAM HUSSEIN & NOTHER.....DEFENDANT

- 1. Running down action**
- 2. Preliminary objection – Res Judicata**
- 3. Section 7 civil procedure act**
- 4. Plaintiff sues in HCCC 6707/91 for material loss Defendant sues in RMCC 7536a/91 now HCCC 5192 for**
- 5. Not res judicate but could be considered as a counter claim**
- 6. Suit consolidated and to be heard in CA 51/92**

RULING

On a Preliminary Objection

On the 24th of September 1990 a motor vehicle collision occurred between two vehicles. One driver by the plaintiffs authorized driver and the other by the 2nd defendant and only authorized driver.

On 18.1.91 (plaint undated) the plaintiff sued the 1st and 2nd defendants for material loss of its motor vehicle. Eleven years and one month later the suit was set down for hearing.

The defendant raised a preliminary objection that this present suit was Res Judicator.

The reasons being that a suit was filed in the Resident Magistrate's court as No. 7536 A/91. IN the said suit the plaintiff was found to be 100% liable for the said accident. This finding had never been set aside nor overruled by a higher court.

In reply the advocate for the plaintiff stated that indeed there was a suit filed as RMCC 7536A/91. There was a default judgment entered. This was exparte. An application to set aside the said judgment and to set the suit for hearing was attempted but never succeeded. There is now an appeal CA 51/92 whereby it is awaiting determination.

The defendant argued that this suit is not res judicator. He admitted that the current suit was filed in December 1991 whilst the previous suit was filed earlier in September 1991.

I have had sight of the said Civil Appeal 51/92, which is yet to be admitted for hearing its appeal. (I cannot understand the proceedings of the lower court.)

The parties therein are the same. The subject matters are the same. The claim in this case could easily be a counter-claim in the previous case.

I would not term this suit as res judicator but I would though give the following directions that this suit be consolidated with civil appeal 51/92.

Whatever decision is taken in that appeal the claim under this suit would be pending.

These are my orders coasts in the cause.

Dated this 27th day of November 2002 at Nairobi.

M. Ang'awa

JUDGE.