



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 16 OF 2020

TRANSMATRESSES LIMITED.....PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF KISUMU.....DEFENDANT

RULING

Transmatresses Ltd, hereinafter referred to as the Plaintiff has sued the County Government of Kisumu claiming to be the registered proprietor and owner of all that parcel of Land known as Kisumu Municipality/Block 9/24. She claims to have constitutional rights to own the property.

The Plaintiff states that the High Court in Kisumu in H.C.C. No. 80 of 2011 between Transmatresses Ltd and Municipal Council of Kisumu, issued a declaration by consent of the parties that the Plaintiff is the lawful owner of Land Parcel number Kisumu Municipality Block 9/24. The court issued injunction to protect the Plaintiff interest.

In this matter the plaintiff prays for a declaration that the issue of ownership and proprietorship was determined in Kisumu High Court Civil Case No. 80 of 2011, Transmatresses Limited Vs Municipal Council of Kisumu and the Plaintiff is the rightful, legal owner of L.R. No. Kisumu Municipality/Block 9/24.

Secondly, the plaintiff prays for a permanent order of injunction restraining the Defendant by itself, its agents, servants, employees and or persons claiming its authority from demolishing, damaging, pulling down, destroying and or in any other way interfering with the developments, structures and buildings in/over/within all that parcel of land known as Kisumu Municipality/Block 9/24.

Lastly, the plaintiff prays for a declaration that the Defendant's notice dated 9th December 2020 served on the Plaintiff is null and void in regard to and relating to all that parcel of land known as Kisumu Municipality/Block 9/24.

It is on record that the plaintiffs' previous suit number 80 of 2011 is in respect of a cause of action that arose on 20/11/2010. The Plaintiffs current suit is in respect of a cause of action that arose on 9/12/2020.

The Defendant has raised a Preliminary Objection that the current suit is res-Judicata.

The then court of Appeal for East Africa in the case of **Mukisa Biscuit Manufacturing Ltd –v- West End Distributors Ltd (supra)** in which Sir Charles Newbold, the president of that court stated:

“A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which 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....”

The principles of Res Judicata are captured under the provisions of Section 7 of the Civil Procedure Act which states:

“No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

Section 28 of the Environment Court Act also bars the court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction.

The doctrine of res judicata has been explained in many decided cases. In the recent case of the **Independent Electoral and Boundaries Commission –v- Maina Kiai & 5 Others (2017) eKLR**, the Court of Appeal held as follows:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:

- a) The suit or issue was directly and subsequently in issue in the former suit.***
- b) The former suit was between the same parties or parties under whom they or any of them claim.***
- c) Those parties were litigating under the same title.***
- d) The issue was heard and finally determined in the former suit.***
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”***

The court explained the role of the doctrine thus:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundation of res judicata thus rest in the public interest for swift, sure and certain justice.”

According to this court, the res judicata principle is meant to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent. The question therefore is whether the defendant’s objection raised has satisfied the conditions for the principle of res judicata in view of the facts of this case.

The defendant has not filed a defence but has opted to file a lengthy preliminary objection. From the pleadings and submissions, it is not in dispute that the subject matter in the previous litigation and the current suit is the same. Both the former suits and the present suit are between the same parties. 15. In the case of **E.T.V –v- Attorney General & Another (2012) eKLR** Majanja J stated that:

“The courts must be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.”

In **Gurbachau –v- Yowani Ekori (1958) EA 450**, the Court of Appeal of Eastern Africa, while considering the doctrine of res judicata, cited at page 453 a passage from the judgment of the **Vice Chancellor in Henderson –v- Henderson (1) 67 ER 313** at page 319 wherein it was stated that:

“In trying this question I believe I state the rule of the court correctly when I say that where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence, might have brought forward at the time”

I do find that the parties are the same and the subject matter is the same and that the issue of ownership of the suit property has been determined by the court. However, the Plaintiff is not seeking a determination on ownership. The Plaintiff is seeking an order of injunction based on the cause of action in respect of the notice dated 9/12/2020. The issue of the new notice has never been before any court of law. It has never been determined. The Preliminary Objection has no basis and is dismissed with costs.

DATED AT KISUMU THIS 18th DAY OF MARCH, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE