



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**CIVIL SUIT 353 OF 2019**

**MARY WANGARI KIARIE.....PLAINTIFF**

**=VERSUS=**

**SAFARICOM (K) LIMITED.....DEFENDANT**

**RULING**

1. The defendant filed a notice of preliminary objection against the Plaintiff's suit on the grounds that this suit is res judicata and is an abuse of the process of the court.

2. The Plaintiff filed grounds of opposition in which she contends that the preliminary objection is not based on pure points of law; that the parties in the former suit and the present suit are different; that the causes of action in the former suit and the present suit are different; that the former suit was not heard and finally determined as to fall under the purview of res judicata and that the doctrine of res judicata in the current suit falls within the exception of "special case" referred to in **Henderson Vs Henderson(1843-60)ALL. ER. 378.** The Plaintiff also contends that this suit is not *res Judicata*.

3. The parties decided to dispose of the preliminary objection by way of written submissions. The Defendant filed submission dated 24<sup>th</sup> June 2020. The Plaintiff filed her submissions dated 26<sup>th</sup> May 2020. I have considered the submission by the parties herein. The only issue for determination in this matter is whether the present suit is res judicata or an abuse of the process of the court.

4. It has been held that a preliminary objection ought to be raised on pure points of law. In the case of **Mukisa Biscuits Manufacturing Co. Ltd. vs. West End Distributors (1969) EA 696 at 700** Law, JA stated thus:

*"...a 'preliminary objection' consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."*

5. Sir Charles Newbold P. in the case of **Mukisa Biscuits Manufacturing Co. Ltd. Vs. West End Distributors (1969) EA case ( supra) added:-**

*"A preliminary objection is in the nature of what used to be a 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."*

6. The Supreme Court of Kenya in the case of **Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others [2015] eKLR** it stated as follows:-

*"Thus a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts."*

7. The court of Appeal in the case of **J E N vs D O K [2018] eKLR** restated the position in the case of **Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others (supra)**. It is in light of the above cases that I venture to decide whether the current suit is res judicata. The Defendant contends that there was **HCCC No. 542 of 2008 Mary Wangari Kiarie & Another V Safaricom Limited & 2 Others** which had been filed. This suit was dismissed for want of prosecution. An application to set aside the dismissal order was also dismissed.

8. It is the Defendant's contention that a dismissal of a case for want of prosecution is a Judgement. In this, the Defendant relied on the case of **Njue Ngai Vs Ephantus Njiru Ngai & another (2016)** where the Court of Appeal held that a dismissal for want of prosecution was as good as a final judgement. The question which then arises is whether a judgement arising from a dismissal of a suit for want of prosecution satisfies the requirements of section 7 of the Civil Procedure Act which states as follows:-

*“No court shall try any suit or issue 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 the 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”.*

9. The question I have posed in paragraph 8 hereinabove was answered by the Court of Appeal in the case of **Michael Bett Siror v Jackson Koech [2019] e -KLR** where the court stated as follows:-

*”We accept that dismissal of a suit for non-attendance or for want of prosecution can amount to a judgment, however, such a judgment does not satisfy the requirements of section 7 of the Civil Procedure Act, as the issues raised in the suit has not been addressed and finally determined by the court, but the judgment is the result of what may be described as a technical knockout”.*

10. In the case of **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR**, when the Court the Supreme Court while considering what amounts to res judicata under section 7 of the Civil Procedure Act held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. The court stated those elements as follows: -

- a) *The suit or issue was directly and substantially in issue in the former suit.*
- b) *That 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.”*

11. In the case of **Ahmed Noorani v Joyce Akinyi Ochieng [2017] eKLR**, the Court of Appeal stated that where an application for committal had been dismissed for non-service on the Respondent, and a fresh application was brought, the fresh application was not res judicata as the Judge who dealt with the dismissed application had not delved into the merits of and did not make conclusive findings thereon. The decision in the case of **Ahmed Noorani (supra)** was cited with approval by the Court of Appeal in the case of **Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 Others [2014] eKLR** where the court stated thus:-

*“To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.”*

12. It is clear from the above quoted decisions that for a case to be res judicata, the issues must have been heard and finally determined in a previous suit. In the instant case, even though the previous suit was dismissed for want of prosecution and an application to revive the same suit was dismissed, the court did not hear the case on merits and the present suit cannot therefore be held to be res judicata as envisaged under section 7 of the Civil Procedure Act.

13. On the issue as to whether this suit is an abuse of the process of the court, I do not think that this suit amounts to an abuse of the process of the court. The previous suit having not been heard on merits, the Plaintiff was at liberty to bring a fresh suit to ventilate her issues. In the case of **Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others Civil Appeal No. 25 of 2002 (2009) e KLR 229**, the court of appeal stated as follows:-

*“ The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious or oppressive”.*

14. In the instant case, I cannot see any elements of abuse of process of court as stated in the case of **Muchanga Investments Limited vs Safaris Unlimited (Africa) (supra)**. I therefore find that the preliminary objection lacks merit. The same is dismissed with costs to the Plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF APRIL 2021.

E. O.BAGA

JUDGE

In the Presence of :-

M/s Wanjiru for Mr Wambugu for Plaintiff

M/s Mose for Defendant

Court Assistant: Okumu

**E.O.OBAGA**

**JUDGE**