



Asset Cargo Limited v Housing Finance Kenya Limited & another (Environment & Land Case 135 of 2018) [2022] KEELC 13577 (KLR) (4 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13577 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 135 OF 2018
LL NAIKUNI, J
OCTOBER 4, 2022**

BETWEEN

ASSET CARGO LIMITED PLAINTIFF

AND

HOUSING FINANCE KENYA LIMITED 1ST DEFENDANT

MUGANDA WASULWA T/A KEYSIAN AUCTIONEERS 2ND DEFENDANT

RULING

I. Introduction

1. The Honorable Court has been called upon to make a determination with regard to the Notice of Motion application dated February 16, 2022 and filed by the Plaintiff/Applicant. It was bought under the Certificate of Urgency by dint of the provision of Order 22 Rules 1, 2, 22 of the [Civil Procedure Rules, 2010](#) and Section 3A of the [Civil Procedure Act, 21](#).

II. The Plaintiff/Applicant's Case

2. The Plaintiff/Applicant herein has sought for the following orders:-
 - a. Spent.
 - b. That the Defendant by themselves or their agents, servants, nominees and/or employees be restrained from attaching, removing and/or repossessing and/or any other manner whatsoever interfering with the Plaintiff's property being the family house on Plot No LR MN/SECTION 1/16043 pending hearing and determination of this application 'Inter parte'.
 - c. That the Plaintiff be allowed to pay and liquidate the consent sum of Kshs 39,661,853.00 vide reasonable installments to wit deposit of Kshs 3,000,000.00 which sum has already been paid,



Kshs 445,000.000 which sum has already been paid and thereafter the balance to be paid at Kshs 400,000.00 per month till payment in full.

- d. That costs of this application be paid by the Defendant.
3. The application is founded on the grounds, testimonial facts and the averments made out under the fifteen (15) Paragraphed Supported Affidavit of Rose Njeri Muiruri - the Director of the Plaintiff sworn and dated February 16, 2022 and the three (3) annexures Marked 'RNM 1 to 3' attached herein. She deponed that being the Director of the Plaintiff/Applicant's company and thus was duly authorized to swear this affidavit on its behalf. She held that the Plaintiff was the legal and absolute registered owner to the suit land and which was a matrimonial property and the home of the Directors of the Plaintiff's company. The Deponent urged Court to allow them, to settle the consented sum of Kenya Shillings Thirty Nine Million Six Sixty One Thousand Eight Fifty Three Hundred (Kshs 39,661,853,000.00) at a monthly installment of Kenya Shillings Four Hundred Thousand (Kshs 400,000.00) till payment was made in full. She based the argument on the ground that there have been negotiations held between the Defendants and themselves being extracts of email and letter dated January 18, 2022 marked as 'RNM - 1'. She averred that in the spirit of settling the same the Plaintiff could not raise the whole sum at once but could do so.
 4. It is for these reason that they urged Court to allow them liquidate Kenya Shillings Thirty Nine Million Six Sixty One Thousand Eight Fifty Three Hundred (Kshs 39, 661, 853.00) vide reasonable instalments to wit to deposit Kenya Shillings Three Million (Kshs 3, 000, 000.00) which sum has already been paid, a sum of Kenya Shillings Four Fourty Five Thousand (Kshs 445, 000.00) which sum had already been paid and thereafter the balance to be paid at Kenya Shillings Four Hundred Thousand (Kshs 400, 000.00) per month till payment was made in full. The deponent maintained that the Plaintiff cannot raise the whole sum at once, but can do so in instalments as they have done in the past (reference is made 'RNM - 2').
 5. She urged court to restrain the 2nd Defendant from unlawfully advertising the suit property for sale by public auction, as they had been doing as shown from a newspaper advertisement being the annexure Marked as 'RNM - 3'). She urged Court to grant the restraining order against the Defendants from interfering with the negotiation and more especially the 2nd Defendant from selling the suit property as threatened vide the advertisement appearing on 'The Standard' newspaper. She averred that the Defendants had not served the Plaintiff with the pre - requisite notices and thus held the advertisement in the newspaper was illegal.
 6. The deponent urged court to allow the application, least the suit property is sold at a throw away price and render the suit nugatory.

III. The Replying Affidavit by the 1st Defendant/Respondent

7. On March 22, 2022, the 1st Defendant/Respondent herein opposing the application by the Plaintiff/Applicant herein filed a 37 Paragraphed Replying Affidavit and sworn by Christine Wahome, their duly appointed Legal Manager and dated March 21, 2022 and 13 annexures Marked as Exhibit JL 1 to 13' annexed herein. She maintained that the application was incompetent, mala fides due to non-disclosure of material facts, devoid of merit, frivolous, vexatious and an abuse of the court process and ought to be dismissed with costs. She deponed that the 1st Defendant created a charge over the suit property for a mortgage facility of Kenya Shillings Twenty Three Million Six Hundred and Thirty Thousand (Kshs 23,630,000/=) to be paid by the Plaintiffs in 180 monthly installments of Kenya Shillings Three Ninety Seven Thousand Nine Fourty Nine Hundred (Kshs 397,949/=). Which the Plaintiff defaulted prompting the defendant to exercise their statutory power of sale, by issuing the requisite statutory



notices to the plaintiff. In a bid to stop the sale, the Plaintiff filed the case of 'Mombasa HCCS No 108 of 2015 Asset Cargo Limited – Versus - Housing Finance Kenya Limited' and sought injunctive orders, at the same time negotiating with the 1st defendant on restructuring the charge. The suit was however withdrawn by a consent recorded on 1st February 2016 on condition that the plaintiff would pay without fail five subsequent monthly instalments arrears of Kenya Shillings Three Hundred and Fifty Five Thousand (Kshs 355,000/=) and maintain an active business current account with the 1st Respondent.

8. The deponent maintained that the Plaintiff never honored the consent agreement prompting the 1st Defendant to initiate the process of exercising its statutory power of sale by issuing a demand letter dated May 6, 2016, and a statutory notice to the plaintiff on June 15, 2016. After the lapse of three months, the 1st defendant issued a 40-day notice to the applicant, and further instructed the firm of Njihia Muoka Rashid Company to value the suit property to ascertain the forced sale value. After the valuation, the 1st Defendant instructed the 2nd Defendant on December 22, 2016 to proceed and realize the security via a public auction, which they did advertise on the local dailies on February 27, 2017 and scheduled a sale on March 24, 2017.
9. In another bid to stop the auction, the plaintiff sought injunctive orders before this court vide 'Mombasa ELC No 93 of 2017 Asset Cargo Limited – Versus - Housing Finance Kenya Limited'. The court on January 30, 2018 dismissed the application with costs to the 1st Defendant. The deponent contented that this application is res judicata to ELC No 93 of 2017 on the ground that it concerns the same subject matter and the same parties and the same issues before court. The deponent further argued that the Plaintiff is abusing the court process by filing numerous applications in order to frustrate the efforts of the 1st respondent to release security. It was stated that a similar application was dismissed by court on November 25, 2021 as well as another application dated April 25, 2019.
10. The deponent argued that the litigious nature of the Plaintiff is a clear indication that they are not interested in settling the loan but their only intention is to stall the payment which has caused the 1st Defendant prejudice. Court was urged not to review the terms of the consent agreement but rather to enforce it as it is and allow the bank to proceed with the sale. It was maintained that payment the Plaintiff claims to have made of Kenya Shillings Two Hundred and Twenty Five Thousand (Kshs 225,000/=) were made in October 2021 and Kenya Shillings Two Hundred and twenty Thousand (Kshs 220,000/=) in January 2022; while the sum of Kenya Shillings Three Million (Kshs 3,000,000/=) were made in March 2020. The same amounts are minimal in comparison to the amount due and they do not justify the commitment by the Plaintiff's commitment towards settling the charge. The deponent stated that the 1st Defendant is ready to release its security by valuing the suit property and issuing the plaintiff with the requisite notices. She urged court to find that the application was an abuse of the court process and meant to frustrate the recovery of the security.
11. The 1st Respondent also filed a Notice of Preliminary Objection dated March 23, 2022 to further oppose the application on the ground that the application is 'Res judicata' offending the provision of Section 7 of the *Civil Procedure Act*, 2010.

IV. The Supplementary Affidavit by the Plaintiff/Applicant.

12. On May 27, 2022, the Plaintiff filed a 11 Paragraphed Supplementary Affidavit dated May 23, 2022 and sworn by Rose Njeri Muiruri a Director of the Plaintiff in response to the 1st Defendant's Replying Affidavit and making reference to the annexure Marked as 'RNM – 4'. She refuted that the Plaintiff/Applicant had filed the application without disclosing all material facts to this Court and had no intention of abusing the court process. The Deponent informed Court that it was not in dispute



that the Applicant had sought for a Mortgage facility from the Defendant for the purchase of the suit property which was registered in the names of the Plaintiff/Applicant. She stated that the said applications raised different issues which were not related to one another and that they raised different points of law and thus being determined by the Court independently. She urged court to find that in all the said independent applications they were not similar and it was the reason the Court gave independent rulings to the said applications. Court never found them to be Res Judicata as claimed by the 1st Defendant. The deponent claimed that while the application dated April 29, 2019 was seeking to extend the time for the consent agreement, the present application was seeking to restrain the Defendant's agents from interfering with the ongoing negotiations between the Plaintiff's and 1st Defendant's representatives (reference is made to 'RNM – 4'). Ms Njeri urged court to allow the application and restrain the 2nd Defendant from pulling a rug under the Plaintiff's feet.

V. Submissions

13. On diverse dates of March 23, 2022 and May 25, 2022 while all the parties were all present in Court, they were directed that the Notice of Motion application dated February 16, 2022 by the Plaintiff/Applicant herein to be disposed off by way of written Submission. Pursuant to that all the parties fully complied and the Honorable Court proceeded to render this Ruling accordingly.

A. Written Submissions by the Plaintiff/Applicant

14. On July 25, 2022, the Learned Counsel for the Plaintiff/Applicant herein, the Law firm of Messrs. Bosire & Partners Advocates filed their written submissions in favor of the application. Mr Bosire Advocate submitted that while the Plaintiff and the 1st Defendant have negotiating on settlement of the issues, the 2nd Defendant had gone ahead to unlawfully advertise the suit property in one of the local newspaper – 'The Standard'. He held that in so doing clearly they were acting in bad faith with the view of disenfranchising the Plaintiff. The Counsel submitted that Section 59C of the Civil Procedure Act, Cap 21 and as envisioned under the provision of Article 159 (2) (c) of the Constitution of Kenya, 2010, they encouraged parties to settle matters in an out of court settlement. The Counsel urged court to give the parties a chance to finalize their negotiations as they relied on the case of '*Nucon Switchgears Pvt Limited – Versus - Kenya Power Lighting Company Limited (2017) eKLR*', it was held thus:-

' The provisions of Section 59C permits the Court to refer a suit to other methods of Dispute Resolution where the Court considers the case suitable for such referral even where the parties had not contemplated it by way of agreement. Yet here, the parties had contemplated negotiations as the first port of call in the event of disagreement or dispute. The inclusion of this in the Contracts cannot be idle and this Court will have no difficulty effectuating it not in the least because it is also commanded by the Constitution to promote alternative forms of Dispute Resolution. The Plaintiff itself does not have a difficulty submitting to negotiations but is not agreeable to staying the proceedings in the meantime. Counsel had argued that proceedings do not have to be stayed for negotiations to be undertaken. This Court takes a different view. Once parties submit themselves to alternative methods of dispute resolution then their submission should be real and not cynical. It must not be the intention of parties to simply submit for purpose of compliance. The parties ought to give the alternative methods a real chance of resolving their differences. To pursue the Court process in parallel can poison an otherwise conducive atmosphere under which negotiation ought to be carried out. It would be inimical to the negotiations. This Court will order a short 'truce' from litigation for the parties to attempt negotiations.'



15. The Counsel submitted on the Notice of Preliminary Objection, they maintained that the application was not one that breached the doctrine of 'Res Judicata' to the application dated March 25, 2021. The Counsel submitted that the issues raised therein are different from the present application, which has invoked Article 159 of the Constitution to be allowed to explore other Alternative Dispute Resolution avenues with the ongoing negotiations. Further, the Counsel submitted that the Preliminary Objection could not be sustained as it was raised on a point of fact and that the 1st Defendant ought to have made a formal application for court to distinguish between facts and law. The Counsel relied on the case of 'Samuel Waweru – Versus - Geoffrey Muhoro Mwangi [2014] eKLR' it was held that:-

' The definition of a preliminary objection was well set out in the case of Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors ltd (1969) EA 696. 'So far as I'm aware, a preliminary objection consists of a 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. This was followed up by the judgment of Sir Charles Newbold in the same case: 'The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop' This court must now consider whether the issues raised in this Preliminary Objection are matters of fact or law. I have perused the reasons by the applicant in his Preliminary Objection. I have not seen a single point of law that has been raised. What has been raised are purely matters of fact which the defendant's counsel ought to have a chance to respond to. I hold the view that by filing such an objection, the Plaintiff has denied the defendant the opportunity to respond factually to the Preliminary Objection. As a matter of Law, a party upon whom a Preliminary Objection is served, does not have a right to respond factually and can only place before the court the law applicable. What the Plaintiff should have done was to raise matters in relation to conflict by filing a formal application'.

In conclusion, the Learned Counsel argued that the Preliminary Objection did not state how the present application was Res Judicata and it ought to be dismissed with costs to the Plaintiff/Applicant herein. Further, he averred that the court should allow the application as prayed.

B.The Written Submission by the 1st Defendant/Respondent

16. On May 24, 2022, the Learned Counsel, the Law firm of Messrs Miller & Company Advocates, the Counsel for the 1st Defendant filed submissions in opposition of the application. M/s Kaguri Advocate submitted that the Plaintiff is abusing the court's process by filing numerous applications while in default of the loan agreement to the detriment of the 1st Defendant. The Counsel submitted that the applicant has neither demonstrated any economic hardships nor have they tabled an application to restructure the loan. The Counsel submitted that the Plaintiff is bound by the terms of the charge agreement and the court cannot rewrite the terms of the lease, which the court ought to find that the Plaintiff is seeking to avoid repaying the loan by abusing the court process with the misplaced application filed herein.



17. The Counsel submitted that the plaintiff's proposal of paying Kenya Shillings Four Hundred Thousand (Kshs 400,000.00) per month is an attempt to urge court to interfere with the already bidding terms of the loan as opposed to court upholding the sanctity of the loan agreement. Counsel relied in the case of '*Brits Freighters Limited – Versus - Standard Chartered Bank (K) Limited [2018] eKLR*' where it was held that, 'The Respondent submitted that the cornerstone of commercial transactions is the certainty the financial institutions have in realizing and recouping the amounts advanced in case of default by a borrower. Such certainty is all the clearer when there is no dispute as to the default as in this case. The case of 'Brade Gate Holdings Limited & Another -Versus - Jamii Bora Bank Limited' (supra) cited with approval in the case of '*Machakos HCCC No 215 of 2008 Jopa Villas LLC –Versus - Private Investment Corp & 2 Others*', was relied on where it was stated that Courts should not aid the Applicant running away from the obligations lawfully imposed, with its knowledge and participation, but should instead uphold the rights of the Respondent to recover the monies lawfully advanced. Thus Courts must uphold the sanctity of lawful commercial transactions.'
18. Further counsel submitted that the suit property is not matrimonial property as it was registered in the name of the Plaintiff, a limited company and not in the name of the directors. The Plaintiff cannot be allowed to avoid contractual obligations under the guise that the suit property is matrimonial property. The Counsel contended that the bank has a lawful right of statutory realization owing to no payment of the loan under Section 97 (2) of the *Land Act*. Further counsel argued that the consent agreement of January 31, 2019 between the plaintiff and 1st Defendant stated that in default, the bank was at liberty to claim the full outstanding debt of Kenya Shillings Thirty Nine Million Six Sixty One Thousand Eight Fifty Three Hundred and Sixteen cents (Kshs 39,661,853.16/=). The Counsel argued that the plaintiff is not entitled to equity as he has not come with clean hands, for their failure to pay the loan and has caused the bank to incur huge financial costs defending suits.
19. On whether the application is 'Res Judicata', the Counsel submitted to the affirmative that the application is 'Res Judicata' to the one dated March 25, 2021, which was dismissed with costs on November 25, 2021. The Counsel argued that the two applications are similar as the orders sought are to alter the loan agreement which is the subject matter in a bid to disentitle the 1st Defendant of its right to recover the loan amount. The Counsel argued that the application is an utter abuse of the court process and only meant to frustrate the 1st Defendant and urged court to dismiss it with costs to the 1st Defendant.

IV. Analysis And Determination

20. The main issues before court for determination are;
 - a. Whether the application invokes the Doctrine of 'Res Judicata' which offends the provision of Section 7 of the *Civil Procedure Act*, Cap 21 to the application dated March 25, 2022.
 - b. If not, whether the application is merited or is it abuse of the court process.
 - c. Who will bear the costs of the application.

ISSUE No a). Whether the application invokes the Doctrine of 'Res Judicata' which offends the provision of Section 7 of the *Civil Procedure Act*, Cap 21 to the application dated March 25, 2022.



21. From the records, on March 23, 2022 the 1st Defendant/Respondent herein filed a Notice of Preliminary objection dated even date. It held that: -

' The Notice of Motion application dated February 16, 2022, is 'Res Judicate' offending the mandatory provisions of Section 7 of the Civil Procedure Act, Cap 21'

22. According to the Black Law Dictionary a Preliminary Objection is defined as being:

' In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.'

The above legal preposition has been made graphically clear in the now famous case of Mukisa Biscuits Manufacturing Co Ltd – Versus- West End Distributors Limited [1969] EA 696. Where Lord Charles Newbold P held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

' The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer 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 in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop'

23. In addition, this Honorable Court wishes to cite the case of Attorney General & Another –Versus- Andrew Mwaura Githinji & another [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

- i. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
- iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

24. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. Certainly, the issues raised by the 1st Defendant/Respondent is serious and pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issues are not fanciful nor remote. For these reasons, therefore, I find that the objection raised by the 1st Defendant/Respondent was properly filed hereof. It constitutes matters akin to be determined at the preliminary level before embarking on the hearing of the case on its own merit in conformity to Mukisa Biscuits Manufacturing Co Limited (Supra). Applying the above test, the matters raised by the Respondent in their preliminary question are clearly pure points of law that I shall proceed to consider them and determine them accordingly.



The court has prioritized the Defendant's preliminary objection, since it has the potential of dismissing the application.

ISSUE No b). Whether the application is merited or is it abuse of the court process.

25. Under this sub – heading and on the other hand, the Plaintiff/Applicant while opposing the objection raised herein, has contended that the objection is not proper, cannot be sustained and ought to be dismissed with costs as it seeks to rely on set of facts as opposed to pure point of law. They have argued that the law on preliminary Objection is clear, in the celebrated case of 'Mukisa Biscuit Company v West End Distributors Limited [1969] EA 696, Sir Charles Newbold, P laid down the meaning of a preliminary objection as follows:

' Preliminary objection consists of a 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. 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.'

26. The Plaintiff/Applicant contended that the 1st Defendant/Respondent was not raising a true preliminary objection. However, I hold a contrary view. There are certain exception upon which a Preliminary objection on the doctrine of Res Judicata could be properly brought before court. To support my view point herein, I rely on the findings of A Ringera J (as he then was) in '*George W M Omondi & another – Versus - National Bank of Kenya Limited & 2 others [2001] eKLR*' where the Court held inter alia:-

' In fact I must confess I was taken aback by the plaintiffs' counsel's insistence that the issues of locus standi and res judicata were not proper points for a preliminary objection for in my experience at the bar and on the bench I had not before heard it doubted that they were. And I hasten to add that in determining both points, the Court is perfectly at liberty to look at the pleadings and other relevant matters in its records. It is not necessary to file affidavit evidence on those matters as contended by counsel for the plaintiffs. What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of a judicial discretion.'

27. Furthermore, besides having filed the objection on the issue of law, the 1st Defendant/Respondents have at the same time objected the application in consonance to the provision of Order 51 Rule 14 (1) of the Civil Procedure Rules, 2010 by filing a Replying Affidavit herein. Order 51 Rule 14 (1) provides thus:-

' Any Respondent who wishes to oppose any application may file any one or a combination of the following documents:-

- a. A notice preliminary objection; and/or;
- b. Replying affidavit; and/or;
- c. A statement of grounds of opposition (Emphasis is mine).



Thus, based on this legal reasoning, I strongly believe that assertion advanced by the Learned Counsel for the Plaintiff/Applicant and more often held by numerous Litigation and Legal Practitioners alike now rests.

28. Now turning to what must exist in a pleading to meet the threshold of the doctrine of 'Res Judicata', has been stipulated in Section 7 of the Civil Procedure Act, Cap 21. It provides that:

' 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.

Explanation. —(1) The expression 'former suit means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

29. From the above legal provisions, the following are the ingredients that constitutes and the bar of the Doctrine of Res Judicata to be effectively raised and upheld an account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms:-

- 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 this suit in which the issue is raised.

30. It is trite law that 'Res judicata' is a point of law and a true preliminary objection, if proven to exist a court ought to allow its procession and dismiss the entire suit. The Court of Appeal in IEBC – Versus – Maina Kiai & 5 others (2017)eKLR observed that:-

'Res Judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. Thus for the bar of Res Judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;



- 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 this suit in which the issue is raised.

The rule or doctrine of Res - Judicata serves the salutary aim of bringing finality to litigation and afford parties closure and respite from the specter of being vexed, haunted and hounded by issues and suits that have already been determined by competent court. It is designed as a pragmatic and common sensual protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, y a multiplicity of suits and for a, to obtain at last outcomes favorable 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 and calumny. The foundations of Res Judicata this rest in the public interest for swift, sure and certain justice.’

31. The application of these principles stated herein to the instant case. First the matter in issue is directly and substantially the same as in the former application. The main issue herein is the Plaintiff asking court to allow them to pay the consent sum of Kenya Shillings Thirty Nine Million Six Sixty One Thousand Eight Fifty Three Hundred (Kshs 39,661,853/=) vide reasonable instalments of Kenya Shillings Four Hundred Thousand (Kshs 400,000/=) per month till payment in full. While the issue in the application dated March 25, 2021, was for the court to direct the defendant to restructure the agreed sum of Kenya Shillings Twenty Five Million One Hundred and Twenty Thousand Five Eighty Two Hundred (Kshs 25,120,582/=) and for the plaintiff be given adequate time to settle the said restructured loan vides installments. The court on November 25, 2021 dismissed the application with costs to the 1st Defendant herein and held that the Plaintiff and 1st Defendant had a contractual relationship on a loan agreement safeguarded by security, that is the legal charge over the suit property, which the Plaintiff had now breached by defaulting to repay. The court further held that by filing the case the Plaintiff was trying to make court interfere with the binding terms of the loan agreement between the parties.
32. The second and third tests on this issue of law are related, that is the parties have to be the same and they must be litigating under the same title. The parties in the present application are the same with those in the application dated March 25, 2021. The Plaintiff/Applicant herein is the Asset & Cargo Limited who was and still is the Plaintiff/Applicant in the previous application. At the same time, the Respondents herein were still the same Respondents therein. The Certificate of title for the suit land remains the same the charge created over the suit property. The only slight variation is on the loan amount. While in the previous application the loan sum was at Kenya Shillings Twenty Five Million One twenty Thousand Five Eighty Two Hundred (Kshs 25,120,582/=) in the present application it has escalated to a sum of Kenya Shillings Thirty Nine Million Six Sixty One Thousand Eight Fifty Three Hundred (Ksh 39,661,853/=). The last test to satisfy the doctrine of ‘Res Judicata’ to be sustained, is that the court which decided the former application must be competent, and that the former application must have been heard and finally determined. It has not been disputed that this court has the jurisdiction to determine the dispute herein between the parties. It is instructive to note that both applications have come before this specific court. The previous application was heard and



determined by this court and I delivered a ruling on November 25, 2021 whereby this Court dismissed the application with costs to the 1st Defendant.

33. It is trite law that the doctrine of Res Judicata is founded on public policy, the Defendant should not be subjected to defending the same issue repetitively and there must be finality to litigation. This court will not allow the Plaintiff to litigate in bits and portions. They are bound to bring their case all at once with no mischief whatsoever. 'Kuloba J in *Mwangi Njangu – Versus - Meshack Mbogo Wambugu and Esther Mumbi [HCCC No 2340 of 1991] (unreported)*, held that:

' If a litigant were allowed to go on forever re - litigating the same issue with the same opponent before Courts of competent jurisdiction, merely because he gives his case some cosmetic face-lift on every occasion he comes to a Court, then I do not see what use the doctrine of res judicata plays'.

ISSUE No c). Who will bear the costs of the application?

34. It is now well established that the issue of Costs is at the discretion of the Court. Costs means the award that a party is granted at the conclusion of any legal action, process or proceedings in any litigation. The proviso of Section 27 (1) of the [Civil procedure Act](#), cap 21 provides that costs follow the event. By events here, it's the results of the said legal action, process or proceedings in any litigation whatsoever.
35. In the instant case, the Notice of Motion application dated February 16, 2022 by the Plaintiff/Applicant has not been successful and hence arising from this outcome, the Plaintiff/Applicant should bear the costs to the 1st Defendant/Respondent herein.

VI. Conclusion & Disposition

36. In conclusion and upon conducting an intensive analysis of the issues framed herein, this Honorable court on preponderance of probability. Therefore, I proceed to direct as follows:-
- a. That the Notice of Motion application dated February 16, 2022 by the Plaintiff/Applicant herein be and is hereby found to be offending the Doctrine of 'Res Judicata' contrary to the provisions of Section 7 of the [Civil Procedure Act](#), Cap 21 of the Law of Kenya and hence its dismissed with costs.
 - b. That there be an order be and is hereby made upholding the Notice of Preliminary objection dated March 23, 2022 raised by the 1st Defendant/Respondent herein.
 - c. That the interim orders issued on February 17, 2022 be and are hereby consequently lifted.
 - d. That the Costs for the Application to be borne by the Plaintiff/Applicant herein.

IT IS SO ORDERED ACCORDINGLY.

RULING DELIVERED, SIGNED AND DATED AT MOMBASA ON THIS 4TH DAY OF OCTOBER 2022

HON. JUSTICE MR. LL. NAIKUNI (JUDGE),

ENVIRONMENT & LAND COURT AT

MOMBASA

In the presence of:-

- a. M/s. Yumna & Mr. Omar the Court Assistant.



b. M/s Kerubo holding brief for Mr. Bosire Advocate for the Plaintiff/Applicant.

c. M/s. Kaguri Advocate for the 1st Defendant/Respondent.

