



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 201 OF 2020**

**PAUL JESSE MUNGATIA.....PLAINTIFF**

**VERSUS**

**1. K-REP BANK LIMITED (REBRANDED)**

**2. SIDIAN BANK LIMITED**

**3. PETER KINYUA T/A KINYUA AUCTIONEERS.....DEFENDANTS**

**RULING**

1. Before me for consideration is the defendants' Notice of Preliminary Objection dated 14<sup>th</sup> December 2020 that seeks to have the Notice of Motion dated 27<sup>th</sup> October 2020 and the plaint dated 27<sup>th</sup> October 2020 dismissed with costs to the defendants. The defendants raise the Preliminary Objection *in limine* to the hearing of both the plaintiff's Notice of Motion dated 27<sup>th</sup> October 2020 and the Plaint dated 27<sup>th</sup> October 2020 on the grounds that:

*i. This Suit is Res Judicata as the substantive issues raised in it have been determined by a court of competent and equal jurisdiction in Mombasa Environment and Land Court Civil Suit No 315 of 2017; Golden Service Organization and 3 others V Sidian Bank Limited.*

*ii. Thus, this suit is frivolous, misconceived, bad in law and egregious abuse of the court process.*

2. On 8<sup>th</sup> February 2021, court directed that the defendants' notice of preliminary objection be heard first before the plaintiff's application dated 27<sup>th</sup> October 2020 and it be disposed of by way of written submissions. The defendants filed their submissions on 17<sup>th</sup> February 2021 and submitted that the defendants had given sufficient evidence of their objection to the suit and application being *judicata* in their statement of defence dated 14<sup>th</sup> December 2020 and the replying affidavit dated 14<sup>th</sup> December 2020. The defendants' objection is that the suit and the application that seeks interlocutory reliefs are both are *res judicata* and consequently an abuse of court process and should both be struck out with costs.

3. The plaintiff filed his submissions opposing the preliminary objection on 19<sup>th</sup> March 2021 and submitted that the preliminary objection did not meet the threshold of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd. (1969) EA**. That the power of court to dismiss a case should be done sparingly with caution as a last resort because upholding the preliminary objection, the court will have dismissed the plaintiff's suit without giving him his day in court. That the preliminary objection is forcing court to examine a set of facts from elsewhere and for which cannot be discerned from the pleadings before it. The plaintiff concluded by submitting that the issues raised by the plaintiff herein are not the same as those in the suit alleged by the defendants and asked court to dismiss the preliminary objection with costs.

4. I have considered the notice of preliminary objection, the submissions in support and the submissions opposing the same and the issue before me for determination is whether the issues raised in the preliminary objection are merited.

5. The law on preliminary objection is firmly stated on the principles that were set by the **Court of Appeal for East Africa, in Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd. (1969) EA 696**, where Law J.A. and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows:

**Law, JA.**

**“So far as I am aware, 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 on 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.”**

**Newbold, P.**

**“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. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.**

6. The defendants have raised a preliminary objection against the plaintiff's suit and application which could see the entire suit struck out by court. The preliminary objection in this case is that the suit is res judicata and as stated in the case of Mukisa Biscuit, res judicata will arise from a clear implication out of pleadings. The Court will examine the pleadings to make a conclusion whether or not the suit meets the requirement set out in the principle of res judicata.

7. The law on res judicata is provided for by **Section 7 of the Civil Procedure Act** which states 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.”**

8. Res judicata originated from the Roman law, *“ex captio res judicata”* which means “one suit and one decision is enough for any single dispute” and the Latin phrase has further been defined by **Spencer Bower and Handley: Res Judicata (Butterworths Common Law) 4th UK ed. Edition** as:-

**“... a decision, pronounced by a judicial tribunal having jurisdiction over the cause and the parties, that disposes once and for all the matter(s) so decided, so that except on appeal it cannot be relitigated between the parties or their privies.”**

9. Once a final judgment has been announced in a suit, the subsequent judges who are confronted with a suit that is identical to or substantially the same as the earlier one, they would apply the doctrine of res judicata to preserve the effect of the first judgment and strike out the present suit. This is to prevent injustice to the parties of a case supposedly finished, but perhaps mostly to avoid unnecessary waste of time and prevent abuse of the court process.

10. The authority of res judicata applies when the party pleading res judicata establishes a similarity in the following issues between the former and present suits. The parties in the former suit must be the same as those in the current suit or have been represented by a party to the prior action, the claim must be the same in the former and current suit, the parties must have been heard on merit and there must be a final judgement.

11. The former suit **ELC 315 of 2017 Golden Services Organization, Kang'alikya Maluki, Ibrahim Murithi Magiri and Paul Jesse Mungatia V Sidian Bank Limited** was instituted vide a plaint dated 28<sup>th</sup> August 2017 and filed on 29<sup>th</sup> August 2017 by the plaintiff herein and the 2<sup>nd</sup> and 3<sup>rd</sup> defendant herein filed an amended statement of defence dated 15<sup>th</sup> July 2019. The present suit **ELC 201 of 2020 Paul Jesse Mungatia V K-Rep Bank Limited (rebranded), Sidian Bank Limited and Peter Kinyua T/A Kinyua Auctioneers** has been instituted vide a plaint dated 27<sup>th</sup> October 2020 and filed on 30<sup>th</sup> October 2020 by the plaintiff herein and the defendants filed a statement of defence dated 14<sup>th</sup> December 2020 on the same day. In the former suit, the plaintiff herein was the 4<sup>th</sup> plaintiff and in the present suit he is the only plaintiff, while the defendants remain the same in both suits save for the addition of the 3<sup>rd</sup> defendant. Therefore the parties in the former and current suit are the same.

12. In ELC 315 of 2017 “the former suit” the plaint had the following prayers:-

**a) An order of permanent injunction to restrain the Defendant, their servants, auctioneers, licensees, agents or any other persons acting on their behalf from howsoever advertising for sale, selling, auctioning, alienating, transferring, disposing, dispossessing or in any way interfering with the right of ownership and proprietorships to LR. No. Mombasa/Shanzu Squatter/1464, Title Number Gaturi/Githimu/5556, Title Number Kilifi/Kijipwa/369 and CR. 21195/1 a sub-division of MN/111/1512.**

**b) An order for the immediate release of all Title security documents in respect of LR. No. Mombasa/Shanzu Squatter/1464, Title Number Gaturi/Githimu/5556, Title Number Kilifi/Kijipwa/369 and CR. 21195/1 a subdivision of MN/III/1512 as well appropriate documents of discharge for each title.**

**c) An order directed to the defendant to pay the first plaintiff a sum of Kshs.142,806,841.00 being the value of lost income and business consequent to the material breach of contractual obligations plus interests at commercial rates with effect from 28th July, 2017.**

**d) General damages.**

e) *Costs of the suit plus interests.*

f) *Any other or further relief as this court may deem fit and just to grant.*

13. In the present suit the plaintiff prays for:-

a) *A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are in breach of prudential banking guidelines committed criminal acts that warrant withdrawal of the licences issued to operate financial institutions.*

b) *A mandatory injunction compelling the 2<sup>nd</sup> and 3<sup>rd</sup> defendants their servants, agents, workers, employees, proxies and/or any other person howsoever instructed hereto to reinstated the plaintiff to the properties of Kilifi/Kijipwa/369 and Plot 152/III/MN.*

c) *A declaration that any purported exercise of statutory power of sale, auction and/or precipitate action conducted by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is void ab-initio*

d) *Special damages*

e) *General damages*

f) *Costs and incidental herein*

g) *Any other such further relief as the honorable court any deem just and convenient.*

14. The former and present suit are based on the same claim and the same cause. The suit properties in both suit are Kilifi/Kijipwa/369 and Plot 152/III/MN and the charges that were created over them. In the former suit the plaintiff prayed for a permanent injunction against the defendant from selling, disposing, auctioning the said suit properties while in the present suit the plaintiff is praying for a mandatory injunction to compel the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to reinstate the plaintiff to the suit properties.

15. In the former suit the plaintiffs' suit was supported by the bundles of documents and witnesses' statements filed on 29/8/2017 and the supplementary bundle filed on 25/1/2019. At the close of pleadings and interlocutory applications, parties called oral evidence in support of their respective cases. The plaintiffs called evidence of 2 witnesses with the defendant also calling two witnesses. After close of their respective cases, parties filed their submissions. In the former suit, the parties were given ample time to present and make their case before court before a final judgement was made.

16. In the former suit, judgment was entered on merit after all parties were given a chance to present their case. The said judgement was delivered by Lady Justice Omollo on 9<sup>th</sup> June 2020. In dismissing the suit she stated the following:-

**“What orders should the Court grant in this Case? I make an order that the plaintiff's case has not been proved under prayers (a), (b) & (d) and are hereby dismissed. Prayer (c) succeeds partially in terms of the sum of Kshs.31,140 awarded to the plaintiffs with interest at court rates from date of filing of the suit. The remainder amount of Kshs.142,775,701 (obtained by deducting 31,140 from 142,806,841) is dismissed. The costs of the suit is awarded to the defendant.”**

17. Having given an analogy of the two suits, the court now shifts to case law in support of res judicata. In the case of **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”**

18. In **Attorney General & another ET vs (2012) eKLR** it was held that;

**“The courts must always be vigilant to guard 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 form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of **Omondi s NBK & Others (2001) EA 177** the court held that “parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit”. In that case the court quoted **Kuloba J, (as he then was) in the case of **Njanju vs Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported)** where he stated: **If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata.....”******

19. When this court applies the law into the facts before it, it is with no shadow of doubt that the plaintiff in this present case has camouflaged the issues that were litigated and adjudicated upon before a court of competent jurisdiction. From the pleadings it is clear to identify that the parties in the former and present suit are the same, the issues that were litigated upon in the former suit and the ones being raised in the current suit are the same. More to this, the former suit was adjudicated upon after all parties were given a chance to present their facts and evidence. The plaintiff's suit is res judicata to the former suit and will be barred for being the same. Litigants should comprehend the fact that litigation must come to an end and not to abuse the court process by endless litigation on the same issues between the same parties.

20. The doctrine of Res Judicata was put in place to empower court to deliver justice and dismiss suits that are of the very same nature though at a different stage.

21. Res Judicata does not restrict the appeals process, a process which the plaintiff has already put into motion. The plaintiffs in the former suit, having been dissatisfied by the said judgment have exercised their right to appeal and instituted **CA No 179 of 2020 Golden Services Organization and 3 others V Sidian Bank Limited** which is pending before the Court of Appeal. The plaintiff at the appeal stage is in the appropriate avenue to challenge a judgment rather than trying to start a new trial.

22. In the result I find and hold that the defendants' Notice of Preliminary Objection dated 14<sup>th</sup> December 2020 has merit and is allowed and make the following orders:

**a) The plaint dated 27<sup>th</sup> October 2020 and filed on 30<sup>th</sup> October 2020 is hereby struck out with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.**

**b) The Notice of Motion dated 27<sup>th</sup> October 2020 and filed on 30<sup>th</sup> October 2020 is hereby struck out with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.**

**DATED, SIGNED and DELIVERED at MOMBASA this 24<sup>th</sup> day of May, 2021**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**