



**In re BMK (Miscellaneous Application 18 of 2020)
[2023] KEHC 985 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 985 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS APPLICATION 18 OF 2020
LM NJUGUNA, J
FEBRUARY 15, 2023**

BETWEEN

VK 1ST APPLICANT
VK 2ND APPLICANT
CK 3RD APPLICANT

AND

JK 1ST RESPONDENT
RKP 2ND RESPONDENT

RULING

1. Before this court is a preliminary objection dated November 3, 2022 on grounds that:
 - i. The suit is fatally defective and a non-starter.
 - ii. That the Originating Summons herein is *res judicata* as the matters before the court have previously been determined in Miscellaneous Case Number 297 of 2011 in the High Court at Nairobi.
 - iii. That this suit offends the provisions of section 7 of the *Civil Procedure Act*.
 - iv. That the entire suit is brought in bad faith and the same is an abuse of the court process thus the same should be struck out with costs.
2. The court directed that the preliminary objection be canvassed by way of written submissions and only the 2nd respondent complied with the directions.
3. It was submitted that the court had previously made a determination in reference to the orders currently being sought by the applicants vide Miscellaneous Application Number 297 of 2011; and



that the same has been admitted by the applicants in their supporting affidavit at paragraphs 20, 21, 22 and 24. Reliance was placed on Section 7 of the *Civil Procedure Act* and in the cases of John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR. That the only issue for determination therefore is whether the suit by the applicants offends the doctrine of res judicata. It was contended that the reliefs, parties and cause of action in the suit herein are similar to those in the Miscellaneous Application Number 297 of 2011. This court was therefore urged to dismiss the suit herein with costs to the respondents for the applicants simply re-invited this court to determine matters that have previously been dealt with and that litigation must come to an end.

4. I have considered the preliminary objection, and the submissions filed by the 2nd respondent herein and I find that the main issue for determination is whether the notice of preliminary objection is merited.
5. In the case of *Hassan Ali Jobo & another v Suleiman Said Shabal & 2 Others* SCK Petition No 10 of 2013 [2014] eKLR the Supreme Court stated that:

“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”

6. It is trite that if a preliminary objection is allowed, the same may dispose off the entire suit without giving parties the opportunity to be heard. Therefore, this has to be done with caution given that the court has a duty to hear all parties and determine the case on merit. In addition, this court also has a duty to safeguard itself against abuse of its process.
7. The test for determining the application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission Vs Maina Kiai & 5 Others* [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

- “(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.”

8. Similarly, in the case of *ET v Attorney General & another* (2012) eKLR where 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 Vs 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 v 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*.....”.

9. The suit before the court is not for setting aside or review of the court orders but it’s for conservatory order inhibiting withdrawals and/or any other transactions on the subjects’ Standard Chartered Bank Account No 015*****; this court called for one year bank statement in respect to the aforesaid account; the subject herein to undergo another mental examination; a medical expert to give evidence surrounding the subject’s mental status; subject be produced before this court for purposes of an inquiry for the court to determine the weakness of his mind; applicants be jointly appointed as the subject’s guardians and a permanent injunction do issue restraining the respondents from interfering with the subject’s financial and estate affairs. On the other hand, Miscellaneous Application Number 297 of 2011 sought for similar orders. I have perused the said Miscellaneous Application Number 297 of 2011 and I find that the orders in the respective suits are similar.
10. From the record, I note that the said application was dealt with by HPG. Waweru J via a ruling delivered on August 22, 2011.
11. In expounding further on the essence of the doctrine, the Court in *John Florence Maritime Services Limited & Another Vs Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR pronounced itself as follows:

“The rationale behind *res-judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res-judicata* ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unraveling uncontrollably.”
12. The court went further to reason that the essence of the principle of *res-judicata* is to not only protect the courts from disrepute, but also to protect litigants from unending litigation; that this principle is so classic in that, it includes points or issues that ought to have been brought before the court but which did not find their way there due to the inadvertence of the parties or their counsel. [See *Hendeson Vs Hendeson* (*supra*)].
13. The court vide a ruling delivered on August 26, 2011 did put to rest this matter. It therefore points out that the same matter was dealt with effectively by a court of competent jurisdiction and the same brought to a finality.
14. In reference to the orders made on June 11, 2020 by Muchemi J., I hold the view that given that the said application was already dealt with by HPG. Waweru J., the court was never made aware of the existence of the said Miscellaneous Application and as such, it proceeded to determine a matter which had previously been determined by a court of concurrent jurisdiction. It is my humble view, therefore, that the said orders cannot also stand.



15. Accordingly, the court finds that the preliminary objection has merits and it is hereby allowed.
16. No order as to costs.
17. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF FEBRUARY, 2023.

L. NJUGUNA

JUDGE

