



REPUBLIC OF KENYA



KENYA LAW
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**PKS v GMS (Family Originating Summons E001 of 2022)
[2023] KEHC 19934 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19934 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
FAMILY ORIGINATING SUMMONS E001 OF 2022**

GMA DULU, J

JULY 13, 2023

**IN THE MATTER OF AN APPLICATION BY PETER KINDUNGWA
SHWASHWA UNDER THE MATRIMONIAL PROPERTY ACT NO. 49 OF 2013**

BETWEEN

PKS APPLICANT

AND

GMS RESPONDENT

RULING

1. Before me is an application by way of Notice of Motion dated December 15, 2022 filed by GMS through counsel Kiarie, Kabita, Kihunyu & Associates Advocates.
2. The application was filed under Section 7 of the [Civil Procedure Act](#) (Cap21), and Order 51 Rule 1 of the [Civil Procedure Rules](#), and has the following prayers:-
 1. (Spent).
 2. The Originating Summons dated July 15, 2022 be and is hereby struck out with costs on account of res judicata and abuse of the process of the court.
 3. The costs of this application be paid by the respondent.
3. The application has grounds on the face of the Notice of Motion, that PKS filed an Originating Summons dated July 15, 2022 with the main prayer being an order that matrimonial properties be divided equally among the applicant and the respondent, that the question in issue has already been determined in Nairobi HCC No 38 of 2008(OS) therefore the suit offends the mandatory provisions of Section 7 of the [Civil Procedure Act](#) (Cap21), and that the filing of the present suit is an abuse of the process of the court.



4. The application was filed with a supporting affidavit sworn by GMS on December 8, 2022 amplifying the grounds of the application.
5. The application is opposed through a replying affidavit sworn on 9th January 2023 by PKS, in which it was deponed that Nairobi HCC No 38 of 2008(OS) relating to the same issues herein was dismissed for want of prosecution and thus Section 7 of the Civil Procedure Act did not apply, and as the matter was not res judicata, that Article 50(1) and 159(2) (d) enjoins court to consider the substance of suits in dispensation of justice.
6. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by Mutinda & Wambura & Company Advocates for the respondent, as well as the submissions filed by Kiarie, Kabita, Kihunyu & Associates Advocates for the applicant (Grace Shwashwa).
7. This is an application that calls on this court to dismiss the suit herein on the ground of res-judicata. In this regard, Section 7 of the Civil Procedure Act provides as follows:-

7 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 determined by such court.

8. Courts have severally addressed the application of the doctrine of res-judicata in their decisions. I will only cite were the case of Uhuru Highway Development Ltd vCentral Bank of Kenya (1999) eKLR where the court listed the important ingredients of the res-judicata and follows:-
 - a. The former judgment or order must be final.
 - b. The judgment or order must be on merits.
 - c. It must have been rendered by a court having jurisdiction over the subject matter and the parties; and
 - d. There must be between the first and the second action identity of the parties, of subject matter and cause of action.
9. Under Section 107 of the Evidence Act (Cap.80), the burden is on the applicant for a declaration of res-judicata to demonstrate to the court that all the ingredient of the doctrine of res-judicata have been satisfied in that particular case. The burden herein was on GS, the applicant seeking the court to declare the Originating Summons herein, as invalid on the basis of the doctrine of *res-judicata*.
10. From the pleadings herein and the submissions of counsel, it is admitted that a similar case between the same parties, and on the same subject matter, that is Nairobi HCC No 38 of 2008 (OS) GMS vPSK has already been dismissed.
11. The difference however, is that though the applicant argues that the said Nairobi case was determined on merits, the respondent says that it was dismissed for want of prosecution.
12. My understanding of the law is that if the Nairobi case was determined or dismissed on merits after the court hearing the parties, or even settled by consent of the parties, then the doctrine of res judicata would apply. If however it was dismissed for want of prosecution, res-judicata will not apply to subsequent proceedings, as the earlier case, was not heard and determined on merits, and the same dismissed case could even be re-opened or revived by the court, on application of the plaintiff.



13. It was thus upon the applicant herein GS to demonstrate to this court, on the balance of probabilities that the Nairobi case above, was determined on merits and with finality and not merely dismissed for want of prosecution.
14. I note that filed with the present application, the applicant in fact filed a Notice for Dismissal of suit for want of prosecution of Nairobi Family Division Case No 38 of 2008, and such dismissal was scheduled to be done by the court on September 6, 2018.
15. In my view therefore, the applicant not having demonstrated to this court that on September 6, 2018 the Nairobi case was not dismissed by the court for want of prosecution, she has in effect failed to show on the balance of probabilities that the present case is *res-judicata*.
16. I thus find that this application is not merited. I hold that the case herein is not *res-judicata* and proceed to dismiss the application. Costs of this application will follow the determination of the main suit herein.

DATED, SIGNED AND DELIVERED THIS 13TH DAY OF JULY 2023 AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Ms. Hellen Katiwa for Grace Shwashwa

Ms. Wambura for Peter Shwashwa

Mr. Otolo court assistant

