



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL SUIT NO. 145 OF 2012**

**DENISE GRANATA.....PLAINTIFF/APPLICANT**

**VERSUS**

**INVESCO ASSURANCE CO. LTD.....DEFENDANT/ RESPONDENT**

**CORAM: Hon. Justice S. M. Githinji**

**K.Lughanje & Company Advocates for the Plaintiff/Applicant**

**Gichuki King'ara & Co. Advocates for the Defendant/ Respondent**

**RULING**

The Respondent herein filed a Preliminary Objection to the Application dated 27<sup>th</sup> July, 2020 on the 3<sup>rd</sup> day of December, 2020 on the following grounds:

- 1. THAT the application offends the provisions of Section 7 of the Civil Procedure Act.**
- 2. THAT the application is an abuse of the court process as the Applicant has deliberately withheld material facts including the fact that a similar application was heard and determined by a court of competent jurisdiction and dismissed on the 14<sup>th</sup> day of July, 2020.**
- 3. THAT the application is Res-judicata.**
- 4. THAT the application is an attempt to obtain unjust advantage and is thus commenced for improper purpose that is not sanctioned by law.**

The Preliminary Objection was canvassed by way of written submissions. This court however has not had the benefit of looking at the Respondent's submissions as the same were not filed, bearing in mind that this is their Preliminary Objection that was filed on the 3<sup>rd</sup> day of December, 2020.

The Plaintiff addressed the court on one major issue; whether the Plaintiff's Application dated 27<sup>th</sup> July, 2020 is res-judicata. **Mr. Lughanje** directed the attention of the court to Section 7 of the Civil Procedure Act which provides for the principle of Res-judicata. He also told the court that the doctrine of Res-judicata has been explained in numerous cases including the case of ***The Independent Electoral Boundaries Commission vs Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of (2017) eKLR*** where the Court of Appeal held that for the principle of Res-judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied as they are rendered not in disjunctive but conjunctive terms; the suit or issue was directly and substantially in issue in the former suit, that former suit was between the same parties under whom they or any of them claim, those parties were litigating under the same title, the issue was heard and finally determined in the former suit, and the court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue was raised.

He contended that the Judgment Creditor in his Application dated 21<sup>st</sup> January, 2020 sought orders against the Judgment Debtor directing it to furnish court with its bank account information for accounts held within the jurisdiction of the Republic to enable the Judgment Creditor to attach those accounts in order to recover the decretal sum balance amounting to Kenya Shillings Two Million, Seven Hundred and Eighty-One Thousand, Seven Hundred and Ninety-Five and Seventy-Two Cents (Kshs. 2, 781, 795.72) only.

That the Judgment Creditor in his current application sought orders against the Judgment Debtor directing its officers to attend court for an examination into the judgment Debtors books of account and its ability to settle the balance of the decretal sum. His submission is that the issues raised in both Applications substantially and considerably vary and therefore cannot be qualified to having been settled in any shape or form.

It was also his submission that when the application came up for hearing on the **14<sup>th</sup> day of August, 2020**, the Application dated **21<sup>st</sup> January, 2020** was not heard but rather the court directed the Applicant to move this Honourable court appropriately under **Order 22 Rule 35** as the orders sought in that application could not be granted in ambiguity. According to him, the application was not heard and that the court used its discretionary powers to direct the Applicant to approach and move the court appropriately. Finally, he was of the view that the elements and conditions set out in the case of ***The Independent Electoral Boundaries Commission v Maina Kiaa & 5 Others, Nairobi CA Civil Appeal No. 105 of 2017 (2017) eKLR*** have not been satisfied fully to render the Judgment Creditor's Application dated **27<sup>th</sup> July, 2020** *res-judicata*.

### **ISSUE FOR DETERMINATION**

Is the Application dated 27<sup>th</sup> July 2020 *res-judicata* as alleged in the Preliminary Objection?

### **ANALYSIS AND DETERMINATION**

The Plaintiff filed an application under **Order 22 Rule 7(2)** and **Rule 26** of the Civil Procedure Rules on the 21<sup>st</sup> day of January, 2020 seeking the following orders: -

- 1. The Honourable Court be pleased in the first instance to certify this application urgent; its service be dispensed with and be heard *ex parte* due to its nature and circumstances of urgency.**
- 2. That the Honourable court be pleased to make an order directing the Defendant/ Respondent/Judgment Debtor to furnish to this Honourable Court all its bank accounts held within the Republic to enable the Applicant/ Judgment Creditor to attach the accounts to recover the balance of Kshs. 2, 781, 795.72**
- 3. That the costs for this application be borne by the Defendant/ Respondent.**

There was no response to this application and when the parties appeared before the Deputy Registrar on the 14<sup>th</sup> day of July, 2020 the following orders were made: -

***“Before court is a Notice of Motion dated 21<sup>st</sup> January, 2020 seeking the Respondent to furnish court with particulars of bank account. I direct that the applicant moves the court appropriately under Order 22 Rule 35 to have the officers of the Respondent examined on assets of the company for execution of the Decree. The application is so determined as the court cannot grant the orders in ambiguity.”***

Dissatisfied with the orders of the Court, the applicant filed another application under **Order 22 Rule 7 (2)**, **Rule 26** and **Order 22 Rule 35 of the Civil Procedure Rules** dated **27<sup>th</sup> July, 2020** seeking the following orders:

- 1. The Honourable Court be pleased in the first instance to certify this application urgent; its service be dispensed with and be heard *ex-parte* due to its nature and circumstance of urgency.**
- 2. That the Honourable court be pleased to make order directing attendance of the officers in charge of the Judgment Debtor for an examination of the Judgment Debtor's Books of Account and its ability to settle the balance of the decretal sum.**
- 3. That the Honourable court be pleased to make an order directing the Defendant/ Respondent/ Judgment debtor to furnish to this Honourable court with all its bank accounts held within the Republic to enable the Applicant/ Judgment Creditor to attach the accounts and recover the balance of Khs. 2, 781,795.72**
- 4. That the costs for this application be borne by the Defendant/ Respondent.**

As to what constitutes a preliminary objection has been the subject of several judicial pronouncements and is well settled. The Supreme Court addressed its mind on this issue in the case of ***Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others [2015] eKLR*** and stated:

***“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.”***

More recently, Courts in ***J E N vs D O K [2018] eKLR*** restated the above position.

Were the preliminary objections raised by the respondent founded on pure points of law or on disputed facts as claimed by the applicant? The answer to this question lies with the nature of objection raised; that is, the assertion that the Application is *res-judicata* and the facts relied on. The doctrine of *res-judicata* is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that an individual should not suffer double jeopardy on the same account of litigation. See the Supreme Court's decision in the

case of *Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & Another [2016] eKLR*.

In essence therefore, the doctrine implies that for a matter to be *res-judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction. The Court in the English case of *Henderson Vs Henderson (1843-60) All E.R.378*, observed thus:

**“...where a given matter becomes the subject of litigation in, and of 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 a 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 case, 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.”**

In the matter before this court, the Respondent’s position is that a similar application was made and determined by a court of competent jurisdiction and dismissed on the 14<sup>th</sup> of July, 2020. To the contrary, the applicant states that the orders sought in the applications of 21<sup>st</sup> January, 2020 and 27<sup>th</sup> July, 2020 substantially and considerably vary and that the earlier application was not heard.

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 MainaKiai & 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.”*

Courts have also determined that the foregoing elements apply in equal measure.

I have well considered the orders sought in both applications, and regardless of the terms used in the applications, both applications are touching on the court being asked to direct the Defendant/ Respondent/ Judgment Debtor to furnish court with all its bank accounts held within the Republic to enable the Applicant attach the accounts to recover the balance of Kshs. 2, 781, 795.72.

This court finds that the earlier application of the 21<sup>st</sup> day of January, 2020 was not heard and determined, and this is one of the prerequisite for invocation of the doctrine of *res-judicata*. This court is also hereby guided by the case of;

*Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 Others [2014] eKLR* 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.”**

Based on the foregoing considerations, I dismiss the Preliminary Objection filed on 3<sup>rd</sup> December, 2020 and direct that the application be heard and determined on its merits.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 15TH DAY OF FEBRUARY, 2022.**

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**S.M. GITHINJI**

**JUDGE**

**In the absence of: -**

1. **K.Lughanje & Company Advocates for the Plaintiff/Applicant**
2. **Gichuki King’ara & Co. Advocates for the Defendant/ Respondent**