



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 356 OF 2015**

WAITHIRA KARANJA.....1<sup>ST</sup> PLAINTIFF

PERIS WAMBUI MURAGURI.....2<sup>ND</sup> PLAINTIFF

HENRY NJOROGE KAMANDE

ALL T/A EXCEL BAMBOO PREPARATORY SCHOOL.....3<sup>RD</sup> PLAINTIFF

=VERSUS=

KEZIAH NJERI KARANJA (*sued as the Legal & Personal Representative of the*

*Estate of Clement Benson Gachanja (deceased)*).....DEFENDANT

**RULING**

1. This is the preliminary objection dated 18<sup>th</sup> May 2015 filed by the defendant in respect of the plaintiff's notice of motion dated 2<sup>nd</sup> May 2015.

2. The preliminary objection is premised on the grounds:-

*(1) That the application is incompetent, improperly before the court, bad in law and fatally defective.*

*(2) That the application is res judicata in that the issue in question is the same issue canvassed by the plaintiff in 3 of their previous applications filed in the high court Civil Case No. 194/2011, namely the plaintiff's application dated 9<sup>th</sup> July 2014, 27<sup>th</sup> April 2015 and 2<sup>nd</sup> May 2015 all of which are pending hearing and determination before this honourable court.*

*(3) That the court has no jurisdiction to try this suit in that the issues raised in the suit are the same issues raised in the high court Civil Case NO. 194 of 2011, which suit has been heard and determined.*

*(4) That the orders sought in this application contradict earlier orders of this honourable court and are therefore incapable of being granted.*

3. On the 15<sup>th</sup> May 2019, the court with the consent of parties directed that the preliminary objection be canvassed by way of written submissions.

4. On the 17<sup>th</sup> July 2019, Mr. Nadida who was holding brief for Mr. Owaga for the plaintiffs told the court that the plaintiffs had filed their written submissions. I have gone through the court record and find that they are not on record.

5. I have considered the preliminary objection and the submissions on record. The issue for determination is whether the preliminary objection is merited.

6. According to **Black Law's Dictionary, 10<sup>th</sup> Edition**, a preliminary objection means:-

***“In a case before an international tribunal, an objection to that if upheld would render further proceedings before the tribunal***

*impossible or unnecessary. An objection to the court's jurisdiction is an example of a preliminary objection".*

7. In the case of **Mukisa Biscuits Co Ltd vs West End Distributors Ltd [1969] EA 696** the court stated as per Sir Charles 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 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 exercised of judicial discretion”.*

8. It is the defendant's contention that the issues raised in the notice of motion dated 2<sup>nd</sup> May 2015 have been previously been raised in HCCC No. 194 of 2011. Further that the parties in the former suit and in the instant suit are the same.

9. Section 7 of the Civil Procedure Act provides the following prayer;

*“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”*

10. In HCCC 194 of 2011 the plaintiffs sought the following prayers:-

*“1. An injunction restraining the defendant including agents and/or servants from leasing, alienating, trespassing, dispossessing or evicting the plaintiff or interfering with its quiet possession of LR No. Dagorette/Riruta/4922 of which Land Parcel No. Dagoretti/Riruta/5378 is a subdivision.*

*2. To unconditionally release all goods collected from the plaintiff's premises.”*

A look at the prayers sought in the notice of motion dated 2<sup>nd</sup> May 2015 shows that the plaintiffs are seeking the same prayers.

11. For the bar of res judicata to be raised, the following element must be established;

- (a) A previous suit in which the matter was in issue,*
- (b) The parties were the same or litigating under the same title;*
- (c) A competent court determined the matter in issue on merit and*
- (d) That the issue has been raised once again in a fresh suit.*

12. It is not in doubt that on 24<sup>th</sup> January 2012, the Honourable Judge Mutava granted the orders striking out the plaintiff's plaint, reply to defence as well as defence to counterclaim. In HCCC No. 194 of 2016. The issue was heard and finally determined in the former suit where there were no attempts made to appeal or have the trial court review its decision. The matter was filed at the High Court in 2011 and at the time the High Court had jurisdiction to hear the matter.

13. In the case of **John Florence Maritime Services Ltd & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR** the importance of res judicata was successfully reiterated by an excerpt from the Case of **Kamunye & Others vs Pioneer General Assurance Society Ltd [1971] EA 263** where it was stated:

*“The rationale behind res judicata is based on 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 by 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 unravelling uncontrollably”.*

14. The upshot of the matter is that I find merit in this preliminary objection. The same is upheld. Accordingly, the plaintiff's notice of motion dated 2<sup>nd</sup> May 2015 and the entire suit are hereby struck out for being res judicata with costs to the defendant.

It is so ordered.

Dated, signed and delivered in Nairobi on this 30<sup>th</sup> day of January 2020.

.....

L. KOMINGOI

**JUDGE**

**In the presence of:-**

Mr. Nadida for Mr. Owaga for the Plaintiffs

No appearance for the Defendant

Kajuju - Court Assistant