



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC NO. 608 OF 2015

MUNICIPAL COUNCIL OF KISUMU.....PLAINTIFF

VERSUS

AVATAR SINGH REHEAL.....1ST DEFENDANT

HON. ATTORNEY GENERAL.....2ND DEFENDANT

RULING

The 1st Defendant filed a Notice of Preliminary Objection dated 24th April 2012 that the suit is *res judicata* in that the issues raised in the suit are substantially the same in Kisumu CMCC No. 115 of 1993 and Winam SRMCC No. 380 of 2005 both of which were determined in favour of the 1st Defendant. The Plaintiff filed Grounds of Opposition dated 3rd February 2020 stating that it shall oppose the preliminary objection on the grounds that the preliminary objection is incompetent, does not meet its legal requirement, and is devoid of any merits whatsoever and howsoever. Counsel made rival submissions in court affirming their positions as above.

Issues for Determination

1. Threshold for a preliminary objection

As per Justice Law in *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* [1969] EA 696:

“So far as I am aware, 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...A preliminary objection is in the nature of what used to be 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.”

As per Justice Newbold P, in the same case:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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 point of law pleaded by the 1st Defendant herein is that the suit is *res judicata* and if the facts pleaded are correct will dispose the suit.

2. Whether the suit is res judicata

The Court of Appeal in *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited*? [2017] eKLR held that all the elements of prescribed under Section 7 of the Civil Procedure Act must be present before a suit or issue can be found to be *res judicata*?

“The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;?

(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.”

The issues in this suit were not directly and substantially in issue in the two former suits cited by the 1st Defendant. Kisumu CMCC No. 115 of 1993 centrally involved the blockage of the access road to the parcel known as Plot 2-504-1 Migosi owned by one Rose Achieng Odhiambo. In Winam SRM CC No. 380 of 2005 the Defendant herein sought orders to lift a caution on Kisumu/Kanyakwar 'A'/70 by one Fredrick Omondi Oyoo. The present suit primarily involves the validity of the alleged compulsory acquisition of Kisumu/Kanyakwar 'A'/70 by the Plaintiff and orders relating thereto. The required elements of *res judicata* are not conjunctively present. Therefore, the preliminary objection ought to be, and is hereby dismissed.

DATED AND DELIVERED THIS 28th DAY OF FEBRUARY, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the presence of:

M/S CHELASHAU FOR DEFENDANT

N/A FOR PLAINTIFF