REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL SUIT NO. 20 OF 2016

NUR MUSLIM SCHOOL SOCIETY

Thru' THE CHAIRMAN MOHAMED ABDISHEIKH

THE SECRETARY ALI OMAR SAID AND

THE TREASURER ABDALLA MOHAMED ABDISHEIKH.....PLAINTIFFS

VERSUS

ALI ABDALLA DUHMY (FORMER CHAIRMAN).....1ST DEFENDANT

MOHAMED HEMED ATHAMAN (FORMER TREASURER).....2ND DEFENDANT

NASSIR KHAMIS (FORMER SECRETARY).....3RD DEFENDANT

CORAM: Hon. Justice R. Nyakundi

Ms. Muranje for the Plaintiff

Ms. Gicharu Kimani for the Defendants

RULING

The plaintiffs filed suit on 18.8.2016 against the defendants seeking the following orders:

> ***a). A proper and independent audit and account be conducted and rendered in respect of the Society's property, income, expenditure and affairs generally as stated in paragraph – 9 hereof, the defendants refund all the monies improperly withdrawn from the society's bank account number 0121107007 Barclays Bank, Malindi Branch and refund and/or pay for any monies or property of the Society improperly withdrawn, utilized, taken and/or managed and also effect a proper and complete handover of, inter alia, all the cheque books for the said bank account and any other account, all the cheque books for the accounts or accounts controlled by the Society's property agent called ZUMO PROPERTIES and/or any other agent and all the property of the Society.***

The defendants entered appearance and raised a notice of Preliminary Objection plea in limine seeking the courts power to strike out the plaint with costs for being res judicata in terms Section 7 of Civil Procedure Act.

The learned counsel for the defendant submitted and raised the arguments that the instant suit is identical with the already filed and finalized suit in **HCC NO. 468 OF 2006** as consolidated with **HCCC NO. 144 OF 2012.**

As per the arguments ventilated by counsel in the aforementioned suit the plaintiffs were the defendants whereas in the instant claim the defendants are pursuing the plaintiff for the orders in the plaint.

Counsel further contended that the issues being litigated in this new suit are exactly the same ones the court with competent jurisdiction heard and conclusively determined. Learned counsel buttressed his submissions by citing the following authorities **Civil Suit No. 275 of 2013, Nancy Mwangi T/A Worthlin Marketers v Airtel Network (K) Limited and others, Henderson v Henderson (1843) 67 ER 313, Bernard Mugo Ndegwa –vs- James Nderitu Githae & 2 Others [2010] eKLR**

I have considered the Preliminary Objection by the defendant counsel and the objection by the respondent counsel that the suit is not res judicata. Therefore, the only outstanding issue to be determine by this court is whether the doctrine of res judicata is applicable to the facts of this case.

The Law

Section 7 of the Civil Procedure Act provides that:

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue 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."***

In determining whether the suit is res judicata or not is a matter which has received attention by various courts on the test and principles to be applied in exercising discretion to strike a suit for being res judicata.

To start with, reference is made to the persuasive case of **Elroy Garraway v Ronald William [2011] CCJ 12,**

> ***"[14] As is well known, the principle of res judicata is intended to give finality to judicial decisions. Literally, the term means that a matter has already been finally settled by judicial decision and is not subject to further appeal. In order for the doctrine to be applicable three essential conditions must be satisfied: there must be an earlier decision covering the issue; there must be a final decision on the merits of that issue; and the earlier suit must involve the same parties or parties in privity with the original parties. Once satisfied the principle bars the same parties from litigating on the same claim or any other claim arising from the same transaction or subject matter that was or could have been raised in the first suit. Thus is precluded continued litigation between the same parties in respect of essentially the same cause of action. The concomitant waste of judicial resources is avoided.***
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> ***[15] The eminently reasonable and indeed indispensable proposition of law embodied in the doctrine of res judicata has been examined in numerous cases including Henderson v Henderson (supra)….. Gairy v Attorney General [2001] UKPC 30; The authorities make abundantly clear that res judicata covers two quite different effects of final Judgments. In the first place it forecloses the relitigation of matters that have once been litigated and decided. In the academic literature the bar to which this gives rise is sometimes referred to as 'collateral estoppel' or 'issue preclusion.'***
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> ***Secondly, the doctrine also forecloses any litigation of matters that have never been litigated but which could and should have been advanced in an earlier suit. This foreclosure is sometimes referred to as 'true res judicata' or 'claim preclusion.'***
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> ***[16] A classical exposition of the governing principles was enunciated by Wigram VC in Henderson v Henderson (supra)where he stated:***
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> ***"I believe I state the rule of the court correctly, when I say, that 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 matte 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 cases, not only to points on 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 to the litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."***

From the record, the Court of Appeal in civil application 211 of 2015 the cause of action was the same as the cause of action in this matter. The parties had earlier on litigated in **HCCC 144 OF 2012** the pleadings in that civil claim when scrutinized are prima facie the same issues being sought to be decided in **HCC 20 OF 2016.** I therefore take the view that the plaintiffs and defendants exhausted their claim in the earlier proceedings under **HCC 144 OF 2012** which subsequently was appealed to the **Court of Appeal No. 211 of 2015.** The plaintiffs had an opportunity to raise any primary and secondary issues associated with the dispute and the relief instead of purporting to open a shut claim in **HCC 20 OF 2016.**

I entirely, agree with the defendant counsel that this matter is res judicata. The plaintiffs are therefore estopped from litigating with the same defendants on the same issues that were substantively heard and determined by the High Court and on appeal by the Court of Appeal. If there was any claim outstanding, the parties were under a duty to institute the action in **HCCC NO. 114 OF 2012.**

According the plaint is hereby struck out for being fatally defective with costs to the defendants.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF NOVEMBER 2019.

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R. NYAKUNDI

JUDGE