REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 12 OF 2018

ST MARY'S MISSION HOSPITAL HIGH SCHOOL

THROUGH THE BOARD .....PLAINTIFF

VERSUS

ST MARY'S MISSION HOSPITAL LIMITED.....1ST DEFENDANT

ASSUMPTION SISTERS OF NAIROBI

REGISTERED TRUSTEES.....2ND DEFENDANT

RULING

1. The plaintiff instituted this suit by way of a plaint dated 11th January, 2018. The plaint was filed on 12th January, 2018 contemporaneously with a Notice of Motion of even date.

In the suit, the plaintiff seeks an order of mandatory injunction directed at the defendants to compel them to open St. Mary's Mission Hospital High School and an order of a prohibitory injunction to restrain them from interfering with the learning in the school. In the notice of motion, the plaintiff seeks similar orders in the interim pending the hearing of the application and the main suit.

2. On 24th January, 2018, the defendants filed a notice of preliminary objection seeking that the application and the suit be struck out on the following five grounds:

i. That the suit is res judicata.

ii. That the suit is bad in law and an abuse of the court process.

iii. That the court lacks jurisdiction to hear and determine the matter the same having been determined in Nakuru High Court ELC NO. 224 of 2010.

iv. That the Claimant has no locus standi to institute the suit.

v. That the application together with the suit are frivolous.

3. When the application came up for hearing on 11th April, 2018, the court directed that the preliminary objection be heard first considering that it not only challenged the competence of the suit but also the court's jurisdiction. The objection was argued inter parties on the same date.

4. In her submissions, learned counsel for the defendants, *Ms Wambugu*, contended that the suit is *res judicata* as the issues raised therein had been determined in Nakuru ELC No. 224 of 2010 on 28th September, 2017. Counsel submitted that in the said judgment, the Environment and Land Court in Nakuru (the Nakuru Court) ordered that the school be closed or relocated as its running was contrary to the wishes of the donors of the land on which it stood; that the defendant had closed the school in compliance with that order; that therefore the issue of the closure of the school or its relocation had already been determined by a court of competent jurisdiction and is now *res judicata*.

5. On jurisdiction, counsel submitted that if this court were to accept the plaintiff's invitation to issue a mandatory injunction to re-open the school, it would be sitting on appeal on the decision of the Nakuru Court and it does not have jurisdiction to do so; that by dint of *section 44* of the *Evidence Act*, the judgment in the Nakuru court was a judgment *in rem* and it was binding on all the parties until it was set aside; that the prayers in the application suggest that it is the students and teachers who are aggrieved; that the court does not have jurisdiction to

arbitrate on issues of children or issues related to employment of teachers. It was further submitted that the plaintiff does not have *locus standi* to institute the suit as being a board, it cannot litigate on behalf of the teachers and students and that in any event, the school belongs to the 1st defendant.

6. On her part, learned counsel for the plaintiff opposed the preliminary objection. Relying on *Section 7* of the *Civil Procedure Act*, counsel denied that the suit and the application are *res judicata*. She submitted that the doctrine of *res judicata* is inapplicable in this case as the parties in the two suits are different as well as the issues for determination in both suits. *Ms Mwangi* argued that the court has jurisdiction to determine the prayers in the application as doing so will not amount to countermanding the orders of the Nakuru court.

On the claim that the plaintiff does not have *locus standi*, counsel submitted that the school is run by a board and it is only the board which can sue on its behalf.

7. I have considered the points raised in the preliminary objection and the rival submissions made on behalf of the parties. Having done so, I find that three key issues arise for my determination. These are:

i. Whether the suit and application are bad in law for being *res judicata*.

ii. Whether the court has jurisdiction to hear and determine the suit and the application.

iii. Whether the plaintiff has *locus standi* to institute and maintain the suit.

8. Turning to the first issue, the starting point is a consideration of the law that governs the applicability of the doctrine of *res judicata*. The doctrine is anchored on *Section 7* of the *Civil Procedure Act* which provides as follows:

> ***"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."***

9. A reading of the above provision reveals that the doctrine of *res judicata* has three principal ingredients which must be proved to exist before it becomes applicable. These are:

i. That the issue or issues directly and substantially in issue in the suit under consideration were directly and substantially in issue in a former suit;

ii. That the parties in both suits are the same or parties claiming under them; and

iii. That the issue or issues in question were heard and finally determined in previous proceedings by a court of competent jurisdiction.

10. The Court of Appeal in ***John Florence Maritime Services Limited & Another V Cabinet Secretary For Transport And Infrastructure & 3 Others, [2015] eKLR*** discussed at length the scope of the principle of *res judicata*. The Court held that the doctrine has two main dimensions, that is, cause of action *res judicata* and issues *res judicata*. The court proceeded to express itself as follows:

> ***"The doctrine of*** *res judicata* ***has two main dimensions: cause of action*** *res judicata* ***and issue res judicata.*** *Res judicata* ***based on a cause of action arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action*** *res judicata* ***extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue*** *res judicata* ***may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue."***

11. Applying the above principles to the instant case, it is not disputed that not all the parties in the instant suit were parties in the Environment and Land case decided in Nakuru. The plaintiff in the instant case was not a party to that case. It is also my view that the issues that fell for determination in the Nakuru case were different from the issues being raised in the instant suit. As is clear from the judgment delivered by the Nakuru Court on 28th September 2017 in ELC Civil Suit No. 224 of 2010, the dispute which the court determined in that case was about ownership of four properties located in Nairobi and Elementaita. A secondary issue which arose but which does not appear to have been finally decided by the court related to the style of management of the hospitals located in the properties in question.

12. In the instant suit and application, the plaintiff seeks a mandatory injunction directing the defendants to open the school and a prohibitory injunction restraining them from interfering with the smooth running of the school. I therefore agree with *Ms Mwangi* for the plaintiff that the main issue in this case is whether or not the school should remain closed. The pleadings clearly show that the plaintiff is not claiming ownership of the land on which the school stands. From the foregoing, it is my finding that the principle of *res judicata* does not apply to this case.

13. Having found as I have that the instant suit is not *res judicata*, it necessarily follows that this court has jurisdiction to entertain both the suit and the application as doing so would not have the potential of countermanding orders issued by a court which enjoys the same status as this court. Given the pleadings in this case, the submission that this court does not have jurisdiction to entertain the suit or application

allegedly because it is not a children's court or a labour court competent to handle issues related to children or employment of teachers is with respect, to say the least, misplaced.

14. As stated earlier, the plaintiff seeks orders of injunction against the defendants aimed at compelling them to open a school and to cease from interfering with its operations. The suit has nothing to do with enforcement of children's rights or employment of teachers.

15. In view of the foregoing, it is clear to me that this court has jurisdiction to entertain both the suit and the application and I so find.

16. Regarding the claim that the suit is incompetent for having been instituted by the board which in the defendants' view does not have *locus standi*, I find that no law or authority was cited to this court to support *Ms Wambugu's* submissions that a board in charge of the running and management of a school does not have *locus standi* to sue on behalf of the school. This claim appears to be based on counsel's submission that the school belonged to the 1st defendant and the board did not disclose its capacity to sue in such circumstances. If this be the position, I find that the objection taken to the board's legal standing though a point of law does not in this case meet the test of points of law that ought to be raised in preliminary objections. A preliminary objection as a general rule must be based on pure points of law on uncontested facts and its resolution would not require parties to adduce evidence.

17. I therefore agree with *Ojwang J* (as he then was) in ***Oraro V Mbaja, (2005) eKLR*** when he stated the following regarding what should constitute a preliminary objection:

> ***"… A preliminary objection, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. …"***

In this case, whether or not the school is owned by the 1st defendant is a matter of fact which can only be resolved by the calling of evidence.

18. For all the foregoing findings and reasons, I have come to the conclusion that the preliminary objection dated 24th January, 2018 is devoid of merit. It is accordingly dismissed with costs.

Dated, signed and delivered at Nairobi this 17th day of May, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Ms Jan Mohamed h/b for Mrs Wambugu for the defendants/respondents

No appearance for the plaintiff/applicant

Mr Fidel Salach: Court Assistant