



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 179 OF 2019

WASHUMBU (D.A) COMPANY LIMITED.....PLAINTIFF

VERSUS

CITY BUILDING LIMITED

ATTORNEY GENERAL.....DEFENDANTS

RULING

1. Before me for determination is the Notice of Preliminary Objection dated 28th November, 2019 raised by the 1st defendant and seeks to dismiss the plaintiff's application dated 11th October, 2019 and the suit for the reasons that the same is res judicata and an abuse of the court process. The 1st defendant invited the court to take judicial notice of ELC No. 12 of 2019 in which the parties and the subject matter were the same as the current suit and in which a determination was also made. The 1st defendant therefore submitted that it has met the required threshold to prove that the suit is res judicata and relied on the case of **Chepotula Tongelech –v- Jackson Chamir & 2 Others (2019)eKLR**. Relying on the case of **Livingstone Kunini Ntutu –v- County Council of Narok & 2 Others (2015)eKLR**, the 1st defendant submitted that res judicata is applicable where a consent judgment has been adopted by the court. The 1st defendant further submitted that the plaintiff had previously moved the court in ELC No. 12 of 2019 to set aside the consent judgment, but the court dismissed its application. That the plaintiff is now attempting to review the judgment in ELC NO. 12 of 2019 through the current suit. It is the 1st defendant's submission that the Plaintiff's actions are tantamount to abuse of the court process and offend the doctrine of res judicata.

2. The plaintiff opposed the preliminary objection and submitted that the issue of res judicata does not apply in this case because ELC No. 12 of 2019 was withdrawn by the plaintiff's counsel before it was heard. That there was no consent judgment in ELC No. 12 of 2019, and that under Order 25 of the Civil Procedure Rules, the plaintiff was within its right to withdraw the suit and file another suit, subject to payment of costs. It is therefore the plaintiff's submission that the suit is not res judicata as ELC No. 12 of 2019 was not heard and finally decided.

3. I have considered the rival submissions and the authorities cited. In his ruling in the case of **Garden Square Ltd –v- Kogo & Another (2003) eKLR**, Ringera J (as he then was) stated that what constitutes a true preliminary objection is a pure point of law which if successfully taken would have the effect of disposing of the suit or application. This was in line with the then Court of Appeal for East Africa decision in the case of **Mukisa Biscuits Manufacturing Ltd –v- West End Distributors Ltd (1969) EA 696** in which Sir Charles Newbold, the president of that Court stated:

“A preliminary objection is in the nature of what used to be a demurer. 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. The improper raising of points by ways of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice must stop. ”

4. The preliminary objection by the 1st defendant is mainly that the suit is res judicata. The 1st defendant invited the court to take judicial notice of ELC No. 12 of 2019 in which the parties are the same as the ones in the current suit and in which the subject matter is also the same. It is the 1st defendant's submission that a determination in ELC No. 12 of 2019 was also made.

5. The basis for the objection based on the doctrine of res judicata in Kenya is Section 7 of the Civil Procedure Act Cap 21 which 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 in a former suit between the same parties, or between parties under whom they or any one 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.”

6. In summary, the applicant alleging res judicata must show; that the matter in issue is identical in both suits; that the parties in the suits are substantially the same; that there is a concurrence of jurisdiction of the court; that the subject matter is the same; and, that there is a final determination as far as the previous decision is concerned.

7. I have perused the pleadings and proceedings in **Mombasa ELC NO. 12 of 2019, Washumbu (D.A) Company Limited –v- City Building Limited & Attorney General**. It is apparent that the same plaintiff who filed the previous suit who has filed the instant suit against the same defendants and that the subject matter in both suits is the property referred to as LR. NO. 14206 CR. 71927 also known as Washumbu D. A. Ranch. It is also clear that on 18th February, 2019, ELC Case No. 12 o 2019 was marked as withdrawn with costs to the defendants. Orders 25 of the Civil Procedure Rules permits the withdrawal of suits by a party and such discontinuance or withdrawal cannot be a defence to any subsequent action. However, the court may order a stay of any subsequent suit until costs shall have been paid.

8. In my view, the issues in ELC Case No. 12 of 2019 were never canvassed and determined to conclusion. The issues raised in that suit did not receive a final judgment on merits. A suit will only be barred by res judicata where it has been heard and determined on the substantive merits of the case. As already stated, ELC Case No. 12 of 2019 was simply marked as withdrawn. By reason of the foregoing, I find that the present suit cannot be said to be barred by the plea of res judicata as there was no determination of the claim between the parties on merit. Section 7 of the Civil Procedure Act only bars the court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction.

9. For the foregoing reasons, I am inclined to dismiss the 1st defendant’s preliminary objection dated 28th November, 2019 and decline to dismiss the suit and application dated 11th October, 2019 as requested. The plaintiff shall have costs.

10. It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 21st day of July 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE