



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 234 OF 2014**

**DOUGLAS KIMEMIA MUKONO .....PLAINTIFF**

**- VERSUS -**

**EQUITY BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**SEVEN FOURTEEN LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The issue for determination before me is the Preliminary Objection lodged by the 1<sup>st</sup> Defendant, **EQUITY BANK LIMITED**.
2. Effectively, the Preliminary Objection makes the point that this suit is Res Judicata.
3. That contention stems from the fact the parties in this suit were also the parties in an earlier suit which was then dismissed for want of prosecution.
4. That earlier suit was **DOUGLAS KIMEMIA MUKONO VS EQUITY BANK LIMITED & SEVEN FOURTEEN LIMITED HCCC NO. 679 OF 2009** (at Milimani Commercial Court).
5. On 2<sup>nd</sup> of March 2012 that earlier case was dismissed by Mabeya J.
6. Following the dismissal of that suit, the plaintiff waited for seven (7) months and then he filed the current suit.
7. As the parties to this suit were the same as in the earlier suit; and because the subject matter of the suits was the same, the 1<sup>st</sup> Defendant urged this court to dismiss this suit.
8. Mr. Chege, the Learned advocate for the 1<sup>st</sup> Defendant, submitted that the orders made by Mabeya J. on 2<sup>nd</sup> March 2012, could not have been made in futility. This court was told that it cannot ignore those orders, as by doing so, I would be allowing the plaintiff to abuse the process of the court.
9. Mr. Mokua, the Learned advocate for the 2<sup>nd</sup> Defendant (**SEVEN FOURTEEN LIMITED**), associated himself with the submissions of Mr. Chege.
10. Thereafter, Mr. Mogaka, the Learned advocate for the plaintiff, submitted that the matters being canvassed herein did not constitute a proper Preliminary Objection. His reason for that was that the point being canvassed could not determine the issues between the parties.
11. He pointed out that the plaintiff was seeking orders to compel **EQUITY BANK** to release to him the Title document which the plaintiff had charged to the bank as security for the loan which the bank gave to **SEVEN FOURTEEN LIMITED**.
12. Apparently, the loan had been repaid in full, but the bank had declined to discharge the issue which the plaintiff believes cannot be resolved by the Preliminary Objection.
13. In any event, the matter being urged by the bank was not limited to a pure point of law. The plaintiff pointed out that the bank was calling upon the court to look at the orders which the court

- had made in another case. As that case was not before this court, the plaintiff contended that the court was being called upon to delve into matters of fact.
14. Such matters of fact were described as evidence. Yet the bank had not put forward any affidavit through which it could have produced evidence.
  15. In the absence of documentary evidence, the annexures to Preliminary Objection were said to have been placed before this court irregularly.
  16. In any event, because the earlier case had not been determined on merit, the plaintiff submitted that this current case cannot be Res Judicata. I was therefore invited to invoke the provisions of Article 159 of the Constitution in a robust manner, so as to meet the ends of justice.
  17. After the plaintiff had made his submissions, the bank replied to the same. Mr. Chege advocate submitted that whereas Article 159 of the Constitution talks about procedural issues, the issue of Res Judicata was a substantive issue.
  18. The earlier suit was said to have been dismissed after the plaintiff had been accorded an opportunity to show cause why the earlier suit should not have been dismissed after it had not been prosecuted for 3 years.
  19. For those reasons, I was again invited to uphold the Preliminary Objection, and to dismiss the suit.
  20. Having given due consideration to the respective submissions, I have come to the conclusion that the plaintiff did not fully grasp the meaning and intent of the finality associated with the determination of a suit. Suits can be determined in several ways. The first and probably the best way of determining a case is through a full trial, after which a judgment was delivered. I describe that procedure as probably the best one because it makes it possible for the parties to put forward their cases through witnesses, whose evidence is also tested through cross-examination.
  21. However, cases can also be determined through applications such as those for striking out pleadings or those seeking summary judgment. When a case is determined through those ways, some parties may not feel that they had been accorded every opportunity to make their cases. But such determination remains legitimate. The single most important consideration is that the court would have given the parties an opportunity for a fair hearing.
  22. If a party is accorded an opportunity for a fair hearing but he fails to utilize it, he cannot thereafter blame the court for allegedly failing to determine the “*real issues*”.
  23. I believe that that is the point which the defendants are making in this case, when they pointed out that the plaintiff failed to Show Cause why his case should not have been dismissed for want of prosecution.
  24. In the case of **GEOFFREY MUNDIA KABETHI VS PETER WANJOHI NJOGU & ANOTHER (NYERI) E & L CASE NO. 60 OF 2012**, Ombwayo J. dismissed the suit because it involved the same parties; and same issues as those in an earlier suit.
  25. The learned Judge found that the case was Res Judicata because in the earlier case;

*“The matter was heard and finally determined by the court”.*

26. He ascertained that the issue being raised in the new suit;

*“was considered and determined in the former suits, and the same is required to be determined in this suit in order for the court to make a decision on the alleged partnership”.*

27. In effect, the matters which had been duly considered and determined were being re-visited again. The court rejected the plaintiff’s attempt to litigate over issues which had been determined.
28. Meanwhile, in the case of **KARANJA KARENJU VS THE HON. ATTORNEY GENERAL & ANOTHER HCCC NO. 46 OF 1993**, Nambuye J. (as she then was) also dismissed the case in which an issue was raised after that same issue had been raised before another court of competent jurisdiction, which had heard and finally determined the said issue.
29. But what constitutes a Preliminary Objection?
30. The answer was provided by Law JA in the celebrated decision of **MUKISA BISCUITS & COMPANY LIMITED VS WEST END DISTRIBUTORS LIMITED [1969] E.A. 699**, at page 700 when he said;

*“A Preliminary Objection consists of a pure point of law which has been pleaded, or which*

arises by clear implication out of the pleading and which if argued as a preliminary point may dispose of the suit”.

- 31.To my mind, therefore, the question as to whether or not the case herein was res judicata is a pure point of law which if argued as a preliminary point, may dispose of the suit.
- 32.The facts upon which the issue are founded are not in dispute.
- 33.However, I do hold the considered view that the doctrine of Res Judicata, as set out in Section 7 of the Civil Procedure Act, does not come into play in this case. Section 7 reads 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 the issue has been substantially raised, and has been heard and finally decided by such court”.*

- The emphasis is mine.

- 34.All the other ingredients are in place, save for the fact that the matters in issue had not been heard and finally decided.
- 35.It is clear that the plaintiff had failed to prosecute his earlier case. The case was dismissed for want of prosecution. It was not heard and determined. Therefore, the plaintiff cannot be barred from coming back to court, in an attempt to have the matters in issue resolved on merit.
- 36.Of course, if the plaintiff had been barred by other factors such as time limits, he could not have been heard in the new suit. But when a suit is dismissed for want of prosecution, the plaintiff may bring a fresh action.
- 37.In the circumstances, I find no merit in the Preliminary Objection. It is therefore overruled.
- 38.However, the plaintiff is directed to pay to the defendants, the costs of the previous suit. This order for costs is pegged on the plaintiff’s own offer to pay the said costs.
- 39.As regards the costs of the Preliminary Objection, the 1<sup>st</sup> Defendant will pay the same to the plaintiff. I so order because costs follow the event, and I have found no good reason to deviate from that general rule.

**DATED, SIGNED and DELIVERED at NAIROBI this 4<sup>th</sup> day of November 2014.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

.....for the Plaintiff

.....for the 1<sup>st</sup> Defendant

.....for the 2<sup>nd</sup> Defendant

Mr. C. Odhiambo, Court clerk.