



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC CAUSE NO. 57 OF 2018

JOHN NDETE SAYAYA.....PLAINTIFF

VERSUS

DUNCAN ISAAYA NDUNGU.....DEFENDANT

RULING

The Plaintiff in this case filed their suit on the 24th August, 2018 he filed an application by way of Notice of Motion dated 23rd August, 2018 in which they sought interim injunctive/restraining orders against the defendant restraining them from dealing with suit land No. CIS-MARA/ILMASHARIANI MORIJO NAROK/4 pending the hearing and determination of the suit.

On the 26th October, 2018 when the matter came up before court for directions, it was noted that the Notice of Motion had been served on the Defendants who had since filed their Notice of Preliminary Objections dated 23rd October, 2018 and the court directed that the preliminary objection be disposed of by way of written submissions.

The Defendant's Preliminary objection was basically to the effect that the suit is barred by dint of the provisions of order 7 and 8 of the Limitation of Actions Act (cap 22) Laws of Kenya and further the suit and the applications are caught up within the doctrine of Res judicata. The Defendant argues that the plaintiff had previously filed a case concerning the same subject matter being **NAROK SPMCC No. 123 of 2014, JOHN NDETE SAYAYA -VERSUS- ISAAYA NDUNGU** wherein the Defendant in that matter raised a Preliminary Objection dated 18th April, 2014. The court considered the Preliminary Objection at the lower court and made a ruling dated 7th May, 2015 where the learned Honourable Senior Resident Magistrate dismissed the suit as being time barred and the preliminary objection sustained

I have considered the submissions filed by the Defendant. The law on preliminary objection is now clear. In **MUKISA BISCUIT MANUFACTURING COMPANY LIMITED -VERSUS- WEST END DISTRIBUTORS (1969)EA 696** the court stated that an objection is raised in Limine must be in the nature of demurrer it must be "a pure point of law" to be argued on the assumption that all the facts has to be ascertained of if what is sought is the exercise of judicial discretion".

The issue of res judicata first as embodied under section 7 of the Civil Procedure Act the principal of res judicata applies to bar subsequent proceedings where there has been an adjudication by a court of competent jurisdiction which conclusively determined the rights of the parties with regard to all or any matter in controversy. There is therefore no doubt that the principle applies to suits as well as applications with the same force whether the application be final or interlocutory.

The test to determine whether a matter is res judicata was well laid in the case of **BERNARD MUGO NDEGWA -VERSUS- JAMES NDERITU GITHAE AND 2 OTHERS (2010)EKL.R.** The Applicant alleging res judicata must show that

- (a) The matter in issue is identical in both suits
- (b) That the parties in the suit are substantially the same
- (c) There is a concurrence of jurisdiction of the court
- (d) That the subject matter is the same
- (e) There is a final determination as far as the previous decision is concerned.

Juxtaposing the above principles with the facts of the case, its apparent that the in instant suit parties are the same as well as the claim. It is the same plaintiff that filed the previous suit, the subject matter is ownership of CIS-MARA/ILMASHARIANI MORIJO/NAROK/4 in both suits. A perusal of the proceedings in the previous suit reveals that the preliminary objection was determined conclusively and on merit.

Having found that the suit before me is res judicata I will thus not make any finding on whether the suit is time bared by the provisions of section 7 and 8 of the Limitations of Actions Act.

The upshot of the above is that the suit herein is dismissed with costs to the Defendant.

DATED, SIGNED and DELIVERED in open court at NAROK on this 30th day of July, 2019

Mohammed Kullow

Judge

30/7/19

In the presence of: -

Mr Kiptoo for the Respondent

Mr Lempaa for the Plaintiff N/A

CA:Chuma/Kimiriny