



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 299 OF 2017

MARSELINA SHIALILA EKESA.....PLAINTIFF

VERSUS

BRUNO PATRICK MURUNGA.....DEFENDANT

RULING

The defendant herein raised a preliminary objection on a point of law on the following grounds:-

1. That the suit herein is Res judicata and sub judice as prescribed under Section 6 & 7 of the Civil Procedure Act in that the cause of action herein between the plaintiff and the defendant has already been determined by other courts and that there is also a similar suit pending before court for determination.
2. The prayers sought in the suit cannot be granted as prayed as they have been brought contrary to the prescribed procedure in Order 40 of the Civil Procedure rules 2010.
3. The suit is thus frivolous, vexatious and otherwise an abuse of the court process.

The plaintiff states that she is not aware of any other similar suit.

Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section 7.

“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.”

Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. It is clear that under section 7 of the Civil Procedure Act, the principle of res judicata applies to bar subsequent proceedings when there has been adjudication by a court of competent and concurrent jurisdiction which conclusively determined the rights of the parties with regard to all or any matters in controversy raised. I refer to the case of in the case of **Pop In Kenya Ltd & 3 Others vs. Habib Bank A.G. Zurich C.A. NO. 80 of 1988** where it was held quoting with approval the case of **Yat Tung Investment Co. Ltd vs. Dao Heng Bank Ltd (1975) AC 581**.

“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 litigation in respect of matters which might have been brought forward as part of the subject in

contest, but which were not brought forward only because of 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 point upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward.

In the case of **Henderson vs. Henderson (1843) 3 Hare 100 to 115** the same holding was reached that “*Res Judicata also applies to every point which might properly belonged to the subject of litigation and which the parties exercising due diligence might have brought forward at the time.*”

I have perused the court file and find indeed that there have been other cases concerning the same parties and the same subject matter, these are;

1. The Land Disputes Tribunal Municipality Division
2. The Provincial Appeals Committee Western Province
3. Kakamega Municipality Land Dispute Tribunal
4. Kakamega RMCC Miscellaneous Application No. 57 of 1999
5. Kakamega Judicial Review No. 26 of 2009
6. Kakamega ELC No 184 of 2017 which is still pending.

This suit is a not only res judicata but also subjudice and an abuse of the court process. I therefore strike it out with costs.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23RD DAY OF MAY 2018.

N.A. MATHEKA

JUDGE