



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NYERI**  
**ELC CASE NO. 167 OF 2015**  
**(Formerly NYERI HCC 119 OF 2011)**

**STEPHEN MBUI MWIRARIA.....PLAINTIFF**

**-VERSUS-**

**JAMES WANJOHI GITAH.....1ST DEFENDANT**

**CHARLES WANYEKI WAIRAGU t/a**

**HIPPO GENERAL MERCHANTS.....2ND DEFENDANT**

**RULING**

1.The plaintiff instituted this suit seeking judgment against the defendants jointly and severally for:

- i. Special damages amounting to Kshs. 3, 669, 064.00**
- ii. Compensation for loss of daily earnings and damages for illegal eviction;**
- iii. General damages;**
- iv. Costs of the suit;**
- v. Any other remedy the court may deem fit to grant**
- vi. Interest on (i), (ii), (iii) and (v) at court rates.**

2.As can be gathered from the plaint, the plaintiff's claim is premised on alleged illegalities in levying distress for rent against the plaintiff. In particular, the plaintiff contends that the distress for rent was not conducted in accordance with the law applicable to such an exercise. For instance, the plaintiff alleges that the distress for rent was carried out without valid proclamation, thereby causing him loss and damage.

3.Upon being served with summons to enter appearance, the defendants filed a joint statement of defence in which in addition to denying the allegations levelled against them, contended that the suit is *res judicata* the proceedings that had been conducted in respect of the alleged illegal distress of rent, that is to say, Nyeri Miscellaneous Civil Application No. 29 of 2010. In that regard the defendants have pointed out that the plaintiff's tried to stop the impugned distress for rent through the above cited proceedings in vain.

4. Terming the suit herein an attempt by the plaintiff to appeal the decision of the Business Premises Rent Tribunal (BPRT) (permitting them to levy distress) and that of the lower court (permitting them to forcibly gain entry to the plaintiff's premises to execute the order of BPRT allowing them to levy distress for rent); the defendants argue that the plaintiff who had failed to stop those proceedings cannot set aside the orders obtained in those proceeding through this suit.

5. According to the defendants, the plaintiff ought to have appealed against the decision permitting them to levy distress for rent and/or to forcibly enter her premises to levy distress for rent.

6. Whereas the defendants' defence is premised on the fact that the distress for rent was permitted by the BPRT and the forcible entry permitted by the court, from the pleadings filed in this matter, I gather that the plaintiff's claim is that despite the distress for rent having been permitted by the relevant authorities, the defendants and in particular, the 2nd defendant failed to carry the otherwise legally sanctioned distress for rent in accordance with the law thus occasioning her loss and damage.

7. Having gone through the pleadings filed in this case and the documents filed in support thereof, I find the plaintiff's claim to be arguable on account of the alleged breach of the law by the defendants in carrying out the otherwise permitted distress for rent and forcible entry into the plaintiff's premises to levy distress for rent.

8. Concerning the contention that the suit herein is *res judicata* the proceedings before the BPRT, the lower court and the Auctioneers Board and the contention that the notice of preliminary objection is improper for failure to formalize it, say by filing an application to introduce it, I begin by pointing out that the law does not prescribe the mode of instituting a notice of a preliminary objection and that all what is required is that the court must be able to ascertain if what is urged is a point of law, which on the basis of the pleadings filed the court is able to hear and determine the notice of preliminary objection.

9. The foregoing notwithstanding, I hasten to point out that where evidence is required to ascertain the claim or assertion being made, then that kind of claim or assertion is not the proper province of a notice of preliminary objection. In this regard see the celebrated case of and **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors (1969) E.A 696, where it was held:**

**“a preliminary objection 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.”**

10. Whereas *res judicata* is, by dint of the provisions of **Section 7** of the Civil Procedure Act, a point of law entitling a party against whom a suit is brought or proceedings instituted to get the proceedings preliminarily determined, it is my considered view that, unless the party against whom a plea for *res judicata* is raised has conceded that the matter is *res judicata*, evidence will be required from both the parties before the court can determine whether or not the matter in question is *res judicata*.

11. The mere fact that evidence is required to determine whether or not a suit or proceeding is *res judicata*, unless admitted by the other side, in my view, makes a plea for *res judicata* not the proper province of a notice of preliminary objection.

12. In view of the foregoing, I totally agree with the observation of my brother, **Obaga J.**, in the case of **George Kamau Kimani & 4 Others v. County Government of Trans Nzoia & Another (2014) eKLR** that one cannot raise *res judicata* by way of a preliminary objection and that the best way to raise a ground of *res judicata* is by way of notice of motion where pleadings are annexed to enable the court determine whether the current suit is *res judicata*.

13. Although the defendants have filed a list of documents containing some of the documents through which their claim is hinged, as those documents are yet to be formally introduced to the court and subjected to the process of verification contemplated in law, I am of the view that the defendants cannot rely on those documents before they are formally introduced to the court either through being produced as

exhibits or as annexures in an affidavit sworn with a view of identifying the documents and notifying the court of their intention to rely on them. In my considered view, reliance on the documents when they have not been formally produced in court and the plaintiff/respondent accorded an opportunity to prepare his defence based on the documents would be tantamount to denying the plaintiff/respondent a fair hearing, which this court is obligated to accord him.

14.From the foregoing observations concerning this suit, I need not say more to demonstrate that the preliminary objection herein, as far as is premised on the plea of *res judicata*, is unmaintainable.

15.From what I have hereinabove, I need not say more to demonstrate that the suit should be heard on its merits.

16.The upshot of the foregoing is that the notice of preliminary objection herein has no merit and is dismissed.

17.The costs of prosecuting the notice of preliminary objection shall abide the outcome of the suit.

Orders accordingly.

**Dated, Signed and Delivered at Nyeri this 20th day of February, 2017.**

**L N WAITHAKA**

**JUDGE**