



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CIVIL SUIT NO. 317 OF 2012**

**HARIRIS KAMITI KIHARA.....PLAINTIFF/RESPONDENT**

**=VERSUS=**

**1. JOHN GACHOKA KIHARA**

**2. DAVID MBURU**

**3. SAMUEL KAMAU GATHOGA.....DEFENDANTS/APPLICANTS**

**R U L I N G**

1. On 17/2/2017, the Defendants filed a Notice of Preliminary Objection seeking to have this suit struck out on the following grounds:-

**“1. That this suit is *res judicata* and an abuse of the court process as the issues sort (sic) to be determined were directly in issue in HCCC No.3859 of 1979 and Court of Appeal No.172 of 2011 already determined in favour of the Defendants.**

**2. That the Plaintiff did participate in the proceedings in HCCC No.3859 of 1979 and/or was litigating through the administrators of the estate of his late father, hence the present suit militates against the provisions of Section 7 of the Civil Procedure Act.”**

The Preliminary Objection was canvassed through written submissions.

2. I have carefully considered the substance of the Preliminary Objection as set out in the formal Notice of Preliminary Objection dated 15/2/17. I have also carefully considered the rival submissions tendered by counsel for the Parties herein. The gravamen of the Defendants’ preliminary objection is that the Plaintiff’s suit is *res judicata* and ought to be struck out *in limine*.

3. They contend that the issues sought to be determined in this suit were directly in issue in “HCCC No.3859 of 1979” and in “Court of Appeal No. 172 of 2011”. They further contend that the Plaintiff herein participated in the proceedings in “HCCC No. 3859 of 1979” in that he was litigating through the administrators of the estate of his late father. They contend that for those reasons, the suit herein offends Section 7 of the Civil Procedure Act.

4. The grounds set out in the Notice of Preliminary Objection and the rival submissions by counsel for the parties raise one key issue to be addressed by this Ruling. That issue is whether the question as to whether or not the Plaintiff’s suit is *res judicata* can be canvassed and answered effectually and conclusively through the platform of a notice of preliminary objection such as the one presented and argued by the Defendant. Before I answer that question, I will give a brief outline of the legal framework

and guiding jurisprudential principles on the doctrine of *res judicata* under Kenya's legal system.

5. The doctrine of *res judicata* is enshrined in Section 7 of the Civil Procedure Act which provides as follows:-

**“7. No court shall try any suit or issues 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.”**

6. The Court of Appeal (Law JA ) gave the following often cited recitation of the essential features of the doctrine of *res judicata* in **Mukisa Biscuits Manufacturing Co. Ltd Vs Westend Bakery Ltd (1969) 696;**

**“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that parties were bound by the contract giving rise to the suit to refer the dispute to arbitration”.**

7. In my view, a plea of *res judicata* is in substance a plea of lack of jurisdiction on the part of the court seized of the offending suit. If raised through a proper forum, it disposes the suit and the court downs its tools.

8. Presented to this court are the parties' pleadings and the formal Notice of Preliminary Objection. There is nowhere in the pleadings where the plaintiff has averred that he has previously litigated against the Defendants in respect of the same cause of action. Similarly, no formal motion together with a supporting affidavit has been lodged before the court, placing before the court copies of pleadings and determinations in any previous suit between the parties herein. The matter alluded to in the Notice of Preliminary Objection are allegations of facts which require ascertainment by way of documentary evidence.

9. In my view, in the absence of an express averment admitting the existence of a previous suit and judicial determination of the cause of action therein, a party seeking to invoke the doctrine of *res judicata* with the result of having the suit struck out *in limine* is obligated to move the court by way of a formal application placing before the court proper documentary evidence of existence of a previous suit and determination thereon.

10. The upshot of my answer to the key question in this Ruling is that, in the absence of clear concessionary averments in the Plaintiff's statement of claim, a notice of preliminary objection without any supporting evidence in form of an affidavit is not an efficacious instrument through which to canvass a plea of *res judicata*. An appropriate forum would be a formal application supported by an affidavit with appropriate exhibits. It would be legally untenable to entertain or uphold the plea of *res judicata* in the circumstances of this case.

11. The net result is that the preliminary points raised through the Notice of Preliminary Objection dated 15/2/17 are wholly rejected and the Preliminary Objection is dismissed with costs to the Plaintiff for lack of merit.

**Dated, signed and delivered at Nairobi on ...13<sup>th</sup> day of April 2017.**

.....

**B M EBOSO**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....Advocate for the Defendants

.....Court clerk