



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC CASE NO. 7 OF 2015**

**ALEXANDER SABILA CHEBELYO & ANOTHER ::::::::::: PLAINTIFF**

**VERSUS**

**ORIENTAL COMMERCIAL BANK LTD & ANOTHER ::::: DEFENDANT**

**R U L I N G**

1. At the hearing of the applicants' application dated 16/1/2015, a Preliminary Objection was taken on behalf of the respondents on the ground that this suit is res judicata. Mr Kidiavai for the defendants/Respondents argued that the applicants had filed a similar suit being Kitale HCCC No.7 of 2014 which suit was fully compromised in terms of a consent recorded on 26/11/2014. Hetherefore argued that the present suit is not only res-judicata but is also an abuse of the process of the court.

2. Mr Komen for the applicants in response argued that the present suit is not res judicata as the former suit [Kitale HCCC No. 7 of 2014] was not heard based on evidence. Mr Komen argued that the principle of res-judicata does not apply where a consent is recorded and that in any case the consent in the former case could not result in a decree. He urged the court not to strike out the current suit but instead have it consolidated with the former suit.

3. Mr Kidiavai in response submitted that there was no basis upon which the two suits could be consolidated as the consent in the former suit provided that the suit was to stand dismissed if the entire sum due to the defendant was not paid by 15/12/2014. He further argued that the parties in the former suit opted to have their rights determined by a consent and that it was not mandatory that oral evidence had to be tendered.

4. The principle of res judicata is premised in section 7 of the Civil Procedure Act which provides 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 under whom they or any of them claim, litigating under the same title, in a court of 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”.***

5. The only issue for determination is whether this suit is res judicata or not. It is not contested that the parties in the former suit and in the current suit are the same. The only difference is that there is an additional defendant in the present suit. This additional defendant is the auctioneer. The subject matters of the suit in both the former and present suit are the same.

6. In the former suit, the plaintiffs three properties namely Waitaluk/Kapkoi Block 4/Waitaluk/41, Kitale Municipality Block 15/Koitogos/2314 and Kitale Municipality Block 15/Koitogos/2314 had been advertised for sale pursuant to the defendants statutory power of sale. The plaintiffs moved to court on 5/6/2014 and obtained a temporary injunction stopping, the sale. The parties then went into negotiations which culminated in recording of a consent on 26/11/2014 in the following terms;-

***“1. That the sum due to the defendant/respondent as at 15/12/2014 be fully paid on or before that date.***

***2. That in default, the entire suit do stand as dismissed with costs to the defendant/respondent and the defendant/respondent be at liberty to proceed with its statutory power of sale.***

***3. That the interim orders in place be extended upto 15/12/2014”***

7. The Plaintiffs appear not to have paid the amount due as per the consent. The defendant moved to exercise its statutory power of sale. The three properties were advertised for public auction on 16/1/2015. The Plaintiffs moved to Eldoret Environment and Land court where they filed the current suit. They contemporaneously filed an application for injunction. They were granted a temporary injunction before the file was transferred to Kitale. In the current suit the plaintiffs are challenging the first defendant's exercise of its statutory power of sale in respect of the same properties as in the previous case. The parties compromised the former suit in terms of the consent whose terms I have quoted in relevant parts in paragraph 6 herein above.

8. The issues between the parties were finally settled by way of consent. It is the parties who chose to have the issues determined by way of consent. The argument by Mr Komen that the case ought to have been determined by way of evidence has no legal basis. A suit can be properly determined by either oral evidence or a consent recorded by both parties. The mere addition of a defendant did not change things. The additional defendant is an auctioneer who was given instructions to advertise the properties for sale.

9. It is therefore clear that the issues which were raised in the former case were the same ones which are raised in the present case. I therefore find that the current suit is res judicata. The same as well as the application filed in it are hereby struck out with costs to the defendants.

It is so ordered.

**Dated, signed and delivered at Kitale on this 11th day of March, 2015.**

**E. OBAGA**

**JUDGE**

**In the presence of Mr Bororio for Mr Komen for plaintiffs and Mr Kidiavai for defendants.  
Court Clerk – Kassachoon.**

**E. OBAGA**

**JUDGE**

**11/3/2015**