

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. CASE NO. 370 OF 2012

NYAMU FOUNDATION LIMITED.....PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL.....DEFENDANT

RULING

Coming up before me for determination is the Preliminary Objection dated 16th August 2012 filed by the Defendant stating that the suit is res judicata and hence an abuse of the court process as the same issues had been settled by a court of record and further that the Plaintiff neither pleaded nor disclosed the jurisdiction of the court.

Only the Plaintiff filed written submissions dated 3rd June 2015. The Plaintiff submitted that it had filed **Judicial Review No. 49 of 2010** seeking judicial review of prohibition against the District Commissioner Thika and Wilson G. Njenga which suit was determined. They quoted the decision of the court to this effect:

“I wholly agree with Mr. Mbita’s submissions that jurisdiction under section 8 and 9 of the Law Reform Act cannot be invoked to resolve civil or criminal disputes. There is a wealth of judicial decisions on this point which have found that the judicial review jurisdiction of the High Court is a special jurisdiction which is neither civil nor criminal but it is a jurisdiction described as suit generis.”

The Plaintiff, relying on the above decision, submitted that it is settled law that the exercise of judicial review is limited to the process of decision-making and not the merit or non-merit of the decision. They further submitted that though the parties in this suit and that Judicial Review case are the same, the nature of remedies sought from the two suits are not the same. He stated that in this particular suit, the Plaintiff is seeking a declaration of a right that the parcel of land known as Thika Municipality/Block 7/113 (hereinafter referred to as the “suit property”) belongs to the Plaintiff and damages for trespass, aggravated, exemplary and punitive damages which only this court can grant and not the Judicial Review court which has no jurisdiction to deal with such remedies. On those grounds, the Plaintiff sought for the Defendant’s Preliminary Objection dismissed with costs.

The law pertaining to the doctrine of res judicata is captured under **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, 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.”

Having raised this Preliminary Objection, the onus was upon the Defendant to demonstrate that there had

been a former suit between the same parties in a court competent to try such suit in which the same issues raised herein had been heard and finally decided by such court. However, apart from filing the Notice of Preliminary Objection, no other document was filed by the Defendant to demonstrate that this suit is indeed res judicata. It is only from the Plaintiff's submissions set out above that this court came to learn that there had been a case before the Judicial Review Division of the High Court involving the same parties herein. As I stated earlier, the onus was upon the Defendant to prove that there had been a similar suit filed earlier which renders the present suit res judicata. This has not been done. In my view, therefore, the Defendant has failed to demonstrate that this suit is res judicata and I proceed to dismiss the Preliminary Objection with costs to the Plaintiff.

It is so ordered.

DELIVERED AND SIGNED AT NAIROBI THIS 13TH DAY OF NOVEMBER 2015.

MARY M. GITUMBI

JUDGE