

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 4 OF 2020

JOSEPH MURIITHI NYAGA.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF KIRINYAGA.....RESPONDENT

RULING

1. The Claimant/Applicant's notice of motion application dated 26th February 2020 brought under a certificate of urgency is what ought to have precipitated the Ruling. However, in response thereto the Respondent filed a preliminary objection dated 24th June 2020 which eclipsed the motion. The preliminary objection was to the effect that the suit is fatally defective and a non-starter as it violates the provisions of Section 6 of the Civil Procedure Act as the matter in issue is directly and substantially in issue with previously instituted suit to wit Nyeri ELRC No. 192 of 2018 which is between the same parties litigating under the same title where that suit is pending before this Honourable Court which has jurisdiction to grant the relief claimed; that the suit is fatally defective and a non-starter as it offends Section 7 of the Civil Procedure Act in that the issue in this suit is the same as the same issue between the same parties which issue was substantially in issue in former suits to wit Nyeri ELRC No. 198 of 2018 and Nyeri ELRC No. 24 of 2019 which was between the same parties litigating under the same title in the same court competent to try this suit. As a result the Respondent seeks the dismissal of this suit with costs. The parties were directed on 18th June 2020 to file submissions in order to canvass the motion but none of the parties filed any submissions.

2. A preliminary objection must fit in the prism of the principles set out in the oft cited case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A. 696**. In that case, it was decided in that a preliminary objection must raise pure points of law and not general grounds raised to oppose the application on its merits. A preliminary objection per Law J.A. was stated to be thus:-

“So far as I am aware, 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 the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Charles Newbold P. stated in the same judgment:-

“A preliminary objection is in the nature of what used to be a demurrer. It 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.”

3. The Respondent herein asserts that the suit offends Section 6 and 7 of the Civil Procedure Act. Sections 6 and 7 of the Civil Procedure Act provide as follows:-

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

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.

4. Both Sections offer explanations under the Section which for the purposes of this Ruling would be superfluous to reproduce verbatim. In Section 6 above, it is clear the law prohibits this court to proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed. Section 7 on the other hand prohibits the suit on the issue of *res judicata*. *Res judicata* means a thing adjudicated and refers to an issue that has been definitively settled. **Black's Law Dictionary Ninth Edition** defines *res judicata* as an issue that has been definitively settled by judicial decision. In other words, *res judicata* as a precept that once a competent Court makes a determination on an issue between the parties in a suit on the matters litigated upon in that suit, it is not open for any of the parties to litigate upon those matters again. It is an absolute bar to litigation over the same issues. In the case before me the suit raises matters that are not substantively in issue in any suit pending determination by this Court. As such there is no bar to this current suit. The present suit survives and shall receive directions shortly after the Ruling herein.

5. The motion by the Applicant is merited as there are grounds for grant of the temporary injunction sought in prayers 4 and 5 of the Claimant's notice of motion which is hereby granted pending hearing and determination of the suit.

It is so ordered.

Dated and delivered at Nyeri this 13th day of July 2020

Nzioki wa Makau

JUDGE