



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Commercial Bank Limited v Orapa & another (Commercial Case E336 of 2023)
[2024] KEHC 4130 (KLR) (Commercial and Tax) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4130 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E336 OF 2023**

A MABEYA, J

APRIL 30, 2024

BETWEEN

KENYA COMMERCIAL BANK LIMITED PLAINTIFF

AND

JOHN MOSES ORAPA 1ST DEFENDANT

SALOME SAFO MWAURA 2ND DEFENDANT

RULING

1. This is an application dated 6/10/2023. It was brought under sections 1A, 1B, 3A and 7 of the *Civil Procedure Act*, order 2 rule 15 and order 51 rule 1 of the *Civil Procedure Rules*. It sought orders that the suit be dismissed or struck out as it was res judicata.
2. The grounds of the application were set out on its face and the supporting affidavit sworn by John Moses Orapa on 6/10/2023. It was contended that a similar suit had been filed over the same subject matter and the same was dismissed by this Court thus the plaintiff was guilty of material non-disclosure.
3. That the previous suit was HCC No. 569 of 2014 and the pleadings were identical and the only difference was the parties' advocates and dates. That the suit was dismissed for want of prosecution and attempts to reinstate it through various applications were declined and the plaintiff's filed a notice of appeal which is yet to be withdrawn to date.
4. It was further contended that the parties, cause of action and prayers in the previous suit were similar to the instant one and the plaintiff had thus approached this Court with unclean hands. This Court was thus implored to strike out the suit.



5. The 2nd defendant also filed a notice of preliminary objection dated 6/10/2023 on similar grounds being that the suit was res judicata thus an abuse of due process.
6. The plaintiff opposed the application vide the replying affidavit sworn by Lilian Sogo on 15/11/2023. She averred that the present suit emanated from a mortgage facility of Kshs. 22,050,000/= to enable the applicants complete purchase of a property known as Crystal Villa. It was admitted that a plaint dated 5/12/2024 was filed in HCC No. 569 of 2014 but the same was dismissed for want of prosecution on 11/11/2021.
7. It was however averred that the instant suit did not meet the elements of res judicata as the same did not apply where the earlier suit was dismissed for want of prosecution as the issues therein were not definitely settled by a judicial decision and there was no final judgment on the merits of the case. That the application thus lacked merit and ought to have been dismissed.
8. The 1st defendant's submissions were dated 11/12/2023, the 2nd defendant's were dated 13/12/2023 whereas the plaintiff's were dated 9/1/2024. The main issue for determination is whether the instant suit ought to be dismissed for offending the principle of res judicata.
9. This Court will begin by determining the preliminary objection raised since it is also grounded on the same grounds as the application. As held in *Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd* (1969) EA 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. It is which is argued on the assumption that all facts pleaded by the other side are correct.
10. In the present case, the preliminary objection is grounded on the fact that the matter is res judicata thus this Court is barred from entertaining the instant suit. The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely; that there must be finality to litigation and the individual should not be harassed twice with the same account of litigation. See the Court of Appeal decision in *Nicholas Njeru Vs the Attorney General and 8 others* Civil Appeal No. 110 of 2011 [2013] eKLR.
11. It is not denied that the plaintiff had previously filed the plaint dated 5/12/2024 in HCC No. 569 of 2014. It is also not denied that the suit was dismissed for want of prosecution on 11/11/2021. What is in dispute is whether or not the doctrine of res judicata is applicable where the previous suit was summarily dismissed for want of prosecution.
12. Section 7 of the *Civil Procedure Act* defines the principle of res judicata to apply where the issues in the previous suit ought to have been "heard and finally decided." And, *Black's Law Dictionary* 10th Edition defines the terms "heard and determined" as follows: -

"of a case, having been presented to a Court that rendered Judgment."
13. The term "hearing" is defined in the same dictionary as follows: -

"A judicial session usually open to the public held for the purpose of deciding issues of fact or of law sometimes with witnesses testifying."



14. In *Tee Gee Electrics and Plastics Company Ltd vs. Kenya Industrial Estates Limited* [2005] KLR 97, the Court stated: -

“Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata. The last issue (dismissal for want of prosecution) was the issue in *The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd* [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that res judicata does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits”.

15. A previous suit that was dismissed for want of prosecution cannot be said to have been heard and determined so as to fit within the confines of res judicata. All that the opposite party can do is pursue its costs in the dismissed suit.
16. In the circumstances, the application dated 6/10/2023 and preliminary objection of even date are both found to lack merit and are hereby dismissed with costs to the plaintiff.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL, 2024.

A. MABEYA, FCI Arb

JUDGE

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