



**Koit Developers Limited & 7 others v Orapa & another (Civil Case E493 of 2022)
[2024] KEHC 4227 (KLR) (Commercial and Tax) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4227 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E493 OF 2022
A MABEYA, J
APRIL 30, 2024**

BETWEEN

**KOIT DEVELOPERS LIMITED 1ST PLAINTIFF
SAMAN DEVELOPERS LIMITED 2ND PLAINTIFF
KENETE ENTERPRISES LIMITED 3RD PLAINTIFF
GILERA LIMITED 4TH PLAINTIFF
NASOLE ENTERPRISES LIMITED 5TH PLAINTIFF
BAIA ENTERPRISES LIMITED 6TH PLAINTIFF
MARIMIO ENTERPRISES LIMITED 7TH PLAINTIFF
LINGALA ENTERPRISES 8TH PLAINTIFF**

AND

**JOHN MOSES ORAPA 1ST DEFENDANT
NATIONAL BANK OF KENYA 2ND DEFENDANT**

RULING

1. Before Court is a preliminary objection filed by the defendants and dated 15/6/2023. It was predicated upon the grounds that this Court is barred by the doctrine of res-judicata from hearing the suit herein as a previous suit was dismissed vide a ruling dated 8/7/2007. That the suit was HCCC No. 482 of 2006 between the parties herein.



2. The preliminary objection was canvassed by way of written submissions. The defendants' submissions were dated 5/7/2023 whereas the plaintiffs filed two sets of submissions dated 6/6/2023 and 28/7/2023, respectively.
3. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696 to consist 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.
4. The test to be applied in determining a proper preliminary objection can thus be deduced as follows: -
 - i. It must be a pure point of law which if argued may dispose of the entire suit.
 - ii) It should be based on the presumption that the pleadings and or facts as pleaded by the opposite side are correct or agreed facts.
 - iii) It cannot be entertained where the facts are disputed/contested or are to be ascertained or proved through a process of evidence or what is sought is an exercise of judicial discretion.
5. In the present case, the 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 an individual should not be vexed with the same account of litigation. The determination of the preliminary objection on this ground alone may dispose of the suit preliminarily.
6. In *Quick Enterprises Ltd vs Kenya Railways Corporation*, Kisumu High Court Civil Case No.22 of 1999 (UR), the Court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone.”
7. Though the defendant pleaded that there was a previous suit involving the same parties as those before court, concerning the same issues as the issues raised in the instant suit and seeking similar orders, I note that the pleadings in that suit were not before this Court. It is only by examining those pleadings against those filed in the instant suit that the Court will be able to determine the four corners for res judicata to suffice.
8. Those corners are; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the Court in the former suit.
9. Without having the benefit of examining the pleadings in the previous suit, the Court is unable to make a determination on the merits of the preliminary objection.
10. In the circumstances, I find that the preliminary objection was unwarranted, is incompetent and is therefore dismissed with costs to the plaintiffs. The parties should proceed to undertake pre-trials within 45 days of the date hereof.

It is so ordered.

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

A. MABEYA, FCI Arb



JUDGE

