



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 114 OF 2016 (O.S)

**GILBERT KABAGE KARIANJAH (Suing for and on behalf
of KAGUKU KARIANJAH).....PLAINTIFF**

VERSUS

RICHARD MAINA MUTUNGI..... DEEFENDANT

RULING

1. By Notice of Motion dated 16th October 2018, the defendant seeks dismissal and/or striking out of this suit for being *res judicata*.
2. The application is supported by an affidavit sworn by the defendant. He deposed that the plaintiff herein filed **Nakuru CMCC No. 2396 of 2006** and that the case was dismissed for want of prosecution on 11th November 2008. The plaintiff later filed **Nakuru CMCC No. 595 of 2009** which was struck out for being *res judicata*. He annexed copies of pleadings in both cases and stated that there was no appeal against both decisions. He also referred to criminal proceedings between him and the plaintiff in **Nakuru CM Criminal Case No. 5275 of 1996** and **Nakuru HC Criminal Misc. Applic. No. 199 of 1999**.
3. The plaintiff responded to the application through his replying affidavit sworn on 29th April 2019 and wherein he admitted the existence of the civil cases and even the criminal proceedings and added that *res judicata* is not applicable to the criminal proceedings. He further stated that *res judicata* is not applicable to **Nakuru CMCC No. 2396 of 2006** since the said case was dismissed for non-attendance but was not heard and determined on the merits. Regarding **Nakuru CMCC No. 595 of 2009**, he stated that the case was struck out for being *res judicata* in view of the outcome in **Nakuru CMCC No. 2396 of 2006**. That consequently, *res judicata* is not applicable since none of the cases cited by the defendant were ever heard and determined on the merits.
4. The application was canvassed through written submissions. Parties generally reiterated the positions that they took in the application and replying affidavit. The defendant added that **Nakuru CMCC No. 2396 of 2006** was dismissed under the then **Order IXB Rules 4 and 7(2) of the Civil Procedure Rules 1998** and that **Nakuru CMCC No. 595 of 2009** was held to be *res judicata* on the basis of **Order IXB Rules 7(2) of the Civil Procedure Rules 1998** which forbade bringing a fresh suit on the same cause of action once a suit is dismissed under **Order IXB Rule 4**. He relied on the cases of **Henry Wanyama Khaemba v Standard Chartered Bank of Kenya Limited [2008] eKLR** and **Prof. Christopher Mwangi Gakuu v Kenya National Highway Authority & 5 others [2013] eKLR**.
5. The plaintiff cited the cases of **Nancy Mwangi t/a Worthlink Marketers v Airtel Networks (K) Limited (Formerly Celtel Kenya Limited) & 2 others [2017] eKLR** and **M W K v A M W [2016] eKLR** in support of his argument that *res judicata* is not applicable since the matters cited by the defendant were not heard and determined on the merits.
6. I have carefully considered the application, the affidavit filed and the submissions. The doctrine of *res judicata* is codified at **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.

7. For *res judicata* to apply in a particular matter, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit. See **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others** [2015] eKLR. *Res judicata* operates as a complete estoppel against any suit that runs afoul of it. See **Maithehe Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others** [2018] eKLR.

8. *Res judicata* operates as a bar to subsequent proceedings involving same issue which had been finally and conclusively decided by a competent court in a prior suit between the same parties. In **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others** (supra) the Court of Appeal stated:

... Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of Henderson v Henderson [1843] 67 ER 313: -

“.....where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time”

.... Simply put res judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.

9. There is no dispute that the plaintiff herein filed **Nakuru CMCC No. 2396 of 2006** against the defendant herein and that the case was later dismissed for want of prosecution on 11th November 2008. Similarly, it is not disputed that the plaintiff later filed **Nakuru CMCC No. 595 of 2009** against the defendant herein and that the case was struck out for being *res judicata*. Thus, the parties in this case and the two former cases are the same.

10. A perusal of the plaint in the former case shows that the plaintiff claimed to be the owner of the parcel of land known as Plot No. 67 Marigu ‘B’ Ol Rongai and sought judgment against the defendant and all claiming under him for eviction from the property, a perpetual injunction restraining the defendant and all claiming under him from entering, occupying or remaining on the property as well as mesne profits. In the latter case, the plaintiff similarly sought eviction of the defendant, his agents and servants from the property as well as mesne profits. In the present case, the plaintiff still claims to be the owner of the property. The prayers sought in the Originating Summons are that the court determines the issues of whether or not the plaintiff is the rightful owner of the property, who between the plaintiff and the defendant is the lawful owner of the property, who as between the plaintiff and the defendant should vacate the property to pave way for the other and whether this matter is *res judicata*. The same issues of ownership of the suit property and vacant possession are raised in this suit and the previous suits. Additionally, *res judicata* cuts across this suit and **Nakuru CMCC No. 595 of 2009**. In short, the issues in this suit are the same as the issues in the two previously concluded suits.

11. Both parties in this matter agree that **Nakuru CMCC No. 2396 of 2006** was dismissed under the then **Order IXB Rules 4 and 7(2)** of the **Civil Procedure Rules** and that **Nakuru CMCC No. 595 of 2009** was held to be *res judicata* on the basis of **Order IXB Rules 7(2)** of the **Civil Procedure Rules**. Parties do not however agree on whether the dismissal would be sufficient to render the present matter *res judicata*. Suffice it to state that the court in **Nakuru CMCC No. 595 of 2009** concluded that the matter was *res judicata*. We are not told whether that decision was disturbed on any appeal. Certainly, this matter is not an appeal against the decision in **Nakuru CMCC No. 595 of 2009**.

12. What was the effect of the dismissal under **Order IXB Rule 4**" Did it amount to a determination on the merits" While I note the position that was taken in **M W K v A M W** (supra), I am of the view that a dismissal of a suit for non-attendance or for want of prosecution operates as a judgment. Unless set aside, it finally concludes the matter and determines the issues that were raised therein. I do not have to reinvent the wheel on this. The Court of Appeal has answered the question on more than one occasion, the latest being in **Njue Ngai v Ephantus Njiru Ngai & another** [2016] eKLR when it stated:

*18. Another issue may arise as to whether a dismissal of a suit for non-attendance of the plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the plaintiff to attend court in the case of **Peter Ngome vs Plantex Company Limited** [1983] eKLR stating:*

"Rule 4(1) does not say "judgment shall be entered for the defendant or against the plaintiff." It uses the word "dismissed." The Civil Procedure Act does not define the word "judgment". According to Jowitt's Dictionary of English Law 2nd ed p 1025:

"Judgment is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding or/one of the questions, if there are several."

Mulla's Indian Civil Procedure Code, 13th Ed Vol 1 p 798 says: "Judgment" means the statement given by the judge on the grounds of a decree or order;" "Judgment - in England, the word judgment is generally used in the same sense as decree in this code."

In my view, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order IXB or under any other provision of law. A dismissal of a suit, under Rule 4(1), is a judgment for the defendant against the plaintiff. An application under Rule 3 of Order IXB includes application to set aside a dismissal. This must be so because, when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order IXB. This, I think, clearly shows that Rule 7(2) was intended to bar a plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a plaintiff from applying for the dismissal to be set aside under Rule 8."

...

21. Now, we have seen that a dismissal for want of prosecution was as good as a final judgment in the appeal unless a successful application for setting aside was filed. ...

13. The dismissal of **Nakuru CMCC No. 2396 of 2006** which has not been set aside was effectively a judgment of the said matter on the merits. Similarly, the striking out in **Nakuru CMCC No. 595 of 2009** determined that case with finality. The obvious result is that the issues in this suit which are the same as the issues in the two previously concluded suits are *res judicata*.

14. In the end, this suit is hereby struck out with costs to the defendant.

Dated, signed and delivered in open court at Nakuru this 4th day of December 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Ngugi holding brief for Mr Kiburi for the defendant/applicant

Mr Karanja Mbugua for the plaintiff/respondent

Court Assistants: Beatrice & Lotkomoi



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