



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCC NO.182 OF 2011

JOHN BRUNO MALLANGA OLOO.....PLAINTIFF

VERSUS

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION.....DEFENDANT

RULING

1. This ruling is on a preliminary objection whose notice was filed here on 6/8/2013 and is dated 19/7/2012. The intention to raise it had also been expressed at Para 12 of the defence filed here on 7/12/2011.
2. The preliminary objection is to the effect that this suit is **RES JUDICATA KISUMU HCC NO.185/1989** and thus an abuse of the Court process and therefore ought to be struck out with costs.
3. The Court didn't hear the objection. Submissions were filed instead. The defendant's submissions were filed on 31/7/2013. It was pointed out, inter alia, that this suit is seeking an injunction to restrain the defendant from selling suit parcel **KISUMU/NYALENDA "A"/1463**. This was the same prayer sought in **KISUMU HCC NO.185/98** between the same parties and concerning the same suit property. The background to the legal tussle is that the plaintiff had been advanced a loan of 700,000/= by the defendant which he defaulted in payment. The suit property had been offered as security for the loan. The defendant wants to sell the property in order to realize its money.
4. The defendant says the earlier suit was settled by consent and this suit is therefore **RES JUDICATA**.
5. The plaintiff denies everything. He said there is a joinder of issue on the defence filed. Specifically, the plaintiff denied determination on merit of **KISUMU HCC NO.185/1998**. He also pointed out that the purported consent availed as proof of settlement of the earlier suit is actually an internal Memo of the defendant from one G.M. Magunga to the principal Legal officer. It does not have the plaintiff's signature nor does it show that it was adopted by the **COURT**.

6. The court has considered the submissions filed by both sides. The defendant talked of a consent entered to settle the earlier suit. As evidence of that, it avails a document, which is item No.4 in its list of documents. I have looked at that document. It is actually not a consent. It is essentially a communication within the defendants own office. It actually talks about the consent and even refers to the details of the consent. I agree with the plaintiff that the document cannot be called a consent. Neither the plaintiff himself nor the court itself features anywhere in the document. The documents is purely the defendants internal matter. The defendant would have done well to avail the actual consent.
7. It is also well worth considering whether the objection as raised meets the tenet of what a preliminary objection is or should be. As well pointed out by the plaintiff's side while citing the case of **MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD (1969) EA 696**, a preliminary objection raises a pure point of law. It is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if the facts are disputed or if what the party is seeking is an exercise of judicial discretion.
8. To be sure, what the defendant has raised – **RESJUDICATA** – is a pure point of law. But has the defendant admitted or assumed that the facts pleaded by the plaintiff are correct" The answer is NO. Infact the very fact on which **RES JUDICATA** is based is denied. In fact, at Para 9 of the plaint, the plaintiff says there is pending or previous proceedings instituted between the parties over the same subject mater. This same position is repeated at para 3 of the verifying affidavit. It is in response to this that the defendant pleaded the previous existence and determination of **KISUMU HC NO.185/98**. It remains clear that the plaintiff's position is expressly disputed. This then flies in the face of the requirement that a preliminary objection should proceed on the basis that the facts raised by the other side are correct.
9. These two points namely: Failure to avail the actual consent between the parties and denial of the facts as pleaded militate against the success of the preliminary objection. I am constrained to observe however that the defendant's submissions are powerfully articulated. The major weakness is that they are premised on unproven or wrong positions.
10. The upshot is that the preliminary objection herein fails and is hereby dismissed with costs.

A.K. KANIARU – JUDGE

10/12/2013

10/12/2013

A.K. Kaniaru – Judge

Dianga – Court clerk

No party present

Interpretation: English/Kiswahili

Yogo for defendant

Otieno David (absent) for plaintiff

COURT: Ruling on preliminary objection notice filed on 6/8/2013 and dated 19/7/2012 read and delivered in open COURT.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

10/12/2013



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