Case Number:	Misc Appli 52 of 2006
Date Delivered:	27 Sep 2006
Case Class:	Civil
Court:	High Court at Malindi
Case Action:	-
Judge:	William Ouko
Citation:	REPUBLIC v RESIDENT MAGISTRATE LAMU & another [2006] eKLR
Advocates:	-
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Misc Appli 52 of 2006

IN THE MATTER OF: ORDER LIII CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: APPLICATION BY BWANAHANI BAISHE KWELI AND MUHSIN HUSSEIN BAISHE FOR ORDERS OF JUDICIAL REVIEW FOR ORDERS OF PROHITION AND CERTIORARI

AND

IN THE MATTER OF: PLOT NO. LAMU ISLAND/BLOCK VI/SECTION 12

AND

IN THE MATTER OF: LAMU RMCC NO.6 OF 2005

REPUBLIC ……...APPLICANT

V E R S U S

THE RESIDENT MAGISTRATE LAMU ……...RESPONDENT

AND

AHMED ABDALLA ALI MAAWY ……...INTEREST PARTY

R U L I N G

On 23rd February, 2006 the applicants herein obtained leave to apply for prohibition against Lamu RM Civil Suit No.6 of 2005 and an order that leave granted to operate as a stay of proceedings in the aforesaid Lamu SRMC Suit No.6 of 2005 pending the hearing and determination of the application.

On 17th July 2006, however, the interested party through his advocates filed a notice of preliminary objection, raising a single point; that the present application is *res judicata* Msa Misc Appl. No. 787 of 2005 which was heard and determined.

It was submitted that, apart from the Commissioner of Land, all the parties in the Msa Misc. Appl. No.787/2005 are the same as those herein. That orders sought in the earlier application are the same orders being sought in this application.

Learned counsel for the applicant, on her part, disagreed with these submissions, arguing that the earlier suit was not finally decided by the court. That the two suits are different and further that there is no bar to bringing fresh judicial review proceedings after the initial application was terminated. I have duly considered the foregoing arguments.

This being a notice of preliminary objection, the strict test of raising such objection must be satisfied. A preliminary objection, in the first place, consists of pure point of law, which if argued as such may dispose of the suit. It is a point that is raised on the assumption that matters pleaded by the other party are correct.

A preliminary object will not be raised if any matter has to be ascertained or what is sought is the exercise of judicial discretion.

See **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors** (1973) EA 358. The issue raised in this preliminary objection is one of pure law. If a matter is shown to be *res judicata* a previously concluded suit the court lacks jurisdiction to entertain the latest suit.

It is therefore a point capable of disposing of a suit.

The principle of *res judicata* is provided for under Section 7 of the Civil Procedure Act as follows;

"6. 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 substantially raised and has been heard and finally decided by such court".

The mischief addressed by this rule is first and foremost to bring litigation to a definite conclusion and also to avoid dragging one's opponent to court time and time again over the same dispute.

As Kuloba, J observed in **Mwangi Njagu v Meshack Mbogo Wambugu & Esther Mumbi** Hccc No.234 of 1991;

" If a litigant were allowed to go on forever re-litigating the same issue with the same opponent before courts of competent jurisdiction, merely because he gives case some face-light on every occasion he comes to a court, then I do not see what use the doctrine of *res judicata* plays".

Fundamental to the present application is the requirement that the issue must be one which was substantially raised, heard and decided by a competent court before a plea of *res judicata* can be entertained.

It is conceded that leave in Msa Hcc Suit No.787 of 2005 was set aside.

It would appear from counsels' submissions that the application was not heard. Not much has been annexed to explain how the application was terminated. If the application was not heard for whatever reason, then the instant application cannot be *res judicata.*

For these reasons I find that the present suit is not *res judicata*.

The objection is overruled and dismissed with costs.

Dated and delivered at Malindi this 27th day of September 2006

W. OUKO

J U D G E