



Wamaitha v Zorea Real Estate Agencies & another (Tribunal Case E657 of 2024) [2024] KEBPRT 1542 (KLR) (Civ) (4 October 2024) (Ruling)

Neutral citation: [2024] KEBPRT 1542 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
CIVIL
TRIBUNAL CASE E657 OF 2024
CN MUGAMBI, CHAIR
OCTOBER 4, 2024**

BETWEEN

LUCY WAKONYO WAMAITHA TENANT

AND

ZOREA REAL ESTATE AGENCIES LANDLORD

AND

PYRAMID AUCTIONEERS RESPONDENT

RULING

Introduction

1. The Respondent’s notice of preliminary objection dated 19.6.2024 is brought on the grounds that;-
“The suit herein offends Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya and the same should be struck out forthwith with costs to the defendant/Respondent.”
2. The only issue that I have to determine in the notice of preliminary objection is whether the same is merited or not, whether the objection meets the threshold of a preliminary objection strictly so called.
3. In the often cited case of; Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696, the court held;
“A preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”



4. In the instant objection, it is the Respondents position that the instant suit is Res judicata as it offends the provisions of Section 7 of the Civil Procedure Act, Cap 21 of the Laws of Kenya. The said Section provides as follows;-

“No court shall try any suit on issues 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.”

5. The court in the case of the Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR held that for the bar of Res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. The former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

6. Can the preliminary objection raised by the Respondents answer to the above requirements for the raising of res judicata as a bar to the instant proceedings? In order to establish whether this suit is Res judicata, the Respondents will need lead evidence to establish all the elements listed at paragraph 5 above. The Respondents would further be required to annex the pleadings in the former suit and the decision of the Tribunal in the said suit to afford the court a comparison of the former suit with the subsequent suit.

I therefore agree with the observation in the Tenant’s submissions that the Respondents ought in the circumstances, to bring a formal Application supported by affidavits and exhibits.

In the case of; Oraro vs Mbaja [2005] eKLR, the court while dealing with what amounts to a preliminary objection stated as follows;-

“I think the principle is abundantly clear. A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed...”

7. In the circumstances, I do not find any merits in the Respondents notice of preliminary objection dated 19.6.2024 and the same is hereby dismissed with costs to the Tenant.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 4TH DAY OF OCTOBER, 2024.

HON. CYPRIAN MUGAMBI

CHAIRPERSON



BUSINESS PREMISES RENT TRIBUNAL

Delivered in the presence of Mr. Kuria for the Tenant and Ms. Ndwiga holding brief for Mr. Njehu for the Landlord

Court: Parties to file their responses and submissions on the Application dated 11.6.2024 within fourteen days.
Mention on 14.11.2024.

