



**Ushago Diani Investment Limited v Abdulwahab (Environment & Land
Case 12 of 2023) [2023] KEELC 20213 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20213 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 12 OF 2023
LL NAIKUNI, J
SEPTEMBER 27, 2023**

BETWEEN

USHAGO DIANI INVESTMENT LIMITED PLAINTIFF

AND

JABEEN MANAN ABDULWAHAB DEFENDANT

RULING

I. Introduction

1. The Defendant/Objector herein, Jabeen Manan Abdulwahab, moved this Honorable Court by raising an objection. It was through filing a Notice of Preliminary Objection dated 7th June, 2023. Generally, the objection was with regard to the Complaint, Verifying Affidavit, List of Witnesses along with their statements, List of Documents all dated 25th February, 2023 and filed by the Plaintiff on the following grounds: -
 - a. That the instant suit offends the provision of section 7 of the [Civil Procedure Rules 2010](#).
 - b. That the Complaint herein is “*res judicata*” as the matter before this Court has already been determined in Civil Case No. 157 of 2009 at the High Court at Mombasa and in Civil Appeal No. 60 of 2018 at the Court of Appeal in Mombasa in which the Plaintiff also filed an application to review the Court of Appeal’s judgment, application which was also dismissed.
 - c. That this Honourable court does not have the requisite territorial jurisdiction over the suit property herein that is located in Kwale County.
 - d. That the entire suit is brought in bad faith, is frivolous, vexatious and an abuse of the Court process hence a good candidate for striking out with costs.



II. Submissions

2. On 13th June, 2023, when this matter came up for directions, the parties were guided by Honorable Court whereby they agreed to have the said Preliminary objection be canvassed by way of written submissions. Pursuant to that on 17th July, 2023, directions and strict timelines were given by the Court to that effect. Indeed, while the Defendant/Objector complied by filing his written submissions by the time the court retired to write this ruling, the Plaintiff failed to do so. None of it by the Plaintiff is on record.

A. The Written Submissions by the Defendant/Objector.

3. The Defendant/Objector the Law firm of Messrs. Akanga Matende & Co. Advocates filed their written submissions dated 26th June, 2023. Mr. Matende Advocate submitted that before this Honourable Court the Plaintiff/ Respondent filed a suit in which they sought prayers;
 - a. A permanent injunction restraining the Defendant by herself, her agents and/or servants from selling, transferring, charging, leasing, alienating or in any way whatsoever and howsoever interfering with or dealing with the property known as Kwale/Diani Beach Block/1463.
 - b. A declaration that the Defendant's actions of refusing to transfer parcel no. Kwale/Diani Beach Block/1463 to the Plaintiff is a breach of her obligation as a shareholder of the Plaintiff and of its agreement with its co-shareholders in the Plaintiff.
 - c. A declaration that the parcel of land known as Kwale/Diani Beach Block/1463 is liable to be transferred to the Plaintiff in the alternative the Defendant to compensate the Plaintiff with the investment put towards the suit property worth a sum of Kenya Shillings Thirty Seven Million (Kshs. 37,000,000/=) with understanding that the property was ready for transfer in their favor.
 - d. In default, order directing the Defendant to effect transfer of the parcel of land known as Kwale/Diani Beach Block/1463 to the Plaintiff and in Default the Deputy Registrar of this Honorable court be authorized to execute all documents on her behalf to effect the said transfer.
 - e. Damages for fraud and/or misrepresentation as in Paragraphs 16,17,18,19, 20 and 21.
 - f. Costs of this suit and interest thereon.
4. The Defendant/ Applicant responded by filing a Notice of Preliminary Objection dated 7th June 2023 which stated as follows;
 - a. The instant suit offended the provision of section 7 of the *Civil Procedure Rules 2010*.
 - b. That the Plaintiff herein is res judicata as the matter before this court has already been determined in Civil Case No. 157 of 2009 at the High Court at Mombasa and in Civil Appeal No. 60 of 2018 at the Court of Appeal in Mombasa in which the Plaintiff also filed an application to review the Court of Appeal's judgment, application which was also dismissed.
 - c. That this Honorable Court does not have the requisite territorial jurisdiction over the suit property herein that is located in Kwale County.
 - d. That the entire suit is brought in bad faith, is frivolous, vexatious and an abuse of the Court process hence a good candidate for striking out with costs.



5. The Learned Counsel argued that the Defendant/ Applicant raised the Preliminary Objection due to the similarity in suits filed by the Plaintiff/ Respondent before this Honorable Court as well as the Court of Appeal in Mombasa raising issues which had already been conclusively and competently dealt with by the courts.
6. As stated in Paragraph 1 herein the prayers sought by the Plaintiff/ Respondent are as follows;
 - a. A permanent injunction restraining the Defendant by herself, her agents and/or servants from selling, transferring, charging, leasing, alienating or in any way whatsoever and howsoever interfering with or dealing with the property known as Kwale/Diani Beach Block/1463.
 - b. A declaration that the Defendant's actions of refusing to transfer parcel no. Kwale/Diani Beach Block/1463 to the Plaintiff is a breach of her obligation as a shareholder of the Plaintiff and of its agreement with its co-shareholders in the Plaintiff.
 - c. A declaration that the parcel of land known as Kwale/Diani Beach Block/1463 is liable to be transferred to the Plaintiff in the alternative the Defendant to compensate the Plaintiff with the investment put towards the suit property worth a sum of Kenya Shillings Thirty Seven Million (Kshs. 37,000,000.00/=) with understanding that the property was ready for transfer in their favor.
 - d. In default, order directing the Defendant to effect transfer of the parcel of land known as Kwale/Diani Beach Block/1463 to the Plaintiff and in Default the Deputy Registrar of this Honorable court be authorized to execute all documents on her behalf to effect the said transfer.
 - e. Damages for fraud and/or misrepresentation as in paragraphs 16, 17,18, 19, 20 and 21.
 - f. Costs of this suit and interest thereon.
7. Whereas the prayers contained in High Court Civil Case No. 157 of 2009 which was also filed by the Plaintiff/Respondent are as follows;
 - a. A permanent injunction restraining the Defendant by herself, her agents and/or servants from selling, transferring, charging, leasing, alienating or in any way whatsoever and howsoever interfering with or dealing with the property known as Kwale/Diani Beach Block/1463.
 - b. A declaration that the Defendant's action of refusing to transfer parcel no. Kwale/Diani Beach Block/1463 to the Plaintiff is a breach of her obligation as a shareholder of the Plaintiff and of its agreement with its co-shareholders in the Plaintiff.
 - c. A declaration that the parcel of land known as Kwale/Diani Beach Block/1463 is liable to be transferred to the Plaintiff.
 - d. An order directing the Defendant to effect transfer of the parcel of land known as Kwale/Diani Beach Block/1463 to the Plaintiff and in default the Deputy Registrar of this Honorable Court be authorized to execute all the documents on her behalf to effect the said transfer.
 - e. Damages for fraud and/or misrepresentation as in paragraphs 16, 17,18, 19,20 and 21.
 - f. Costs of this suit and interest thereon.
8. The Learned Counsel submitted that this Honorable Court dismissed High Court Civil Case No. 157 of 2009 and awarded the Defendant/Applicant a sum of Kenya Shillings Five Million Two Hundred Eight Thousand (Kshs. 5, 280, 000.00/=) only as rent that had accrued. The Plaintiff/Respondent



dissatisfied with the decision lodged an appeal (Civil Appeal No. 60 of 2018) where the Honorable Court set aside the award of Kenya Shillings Five Million Two Hundred Eighty Thousand (Kshs. 5, 280, 000.00/=) and in doing so declared, “For the purposes of clarity, we hereby declare that the Respondent (Defendant/Applicant in this suit) is and was the owner of the suit property, but was not entitled to rent in accordance with the agreement of the parties.”

9. Still dissatisfied with the Court of Appeal’s decision, the Plaintiff made an application for review which was also dismissed by the Court of Appeal. Apart from the similarity of prayers in the Plaintiff’s suit, there are also similarities in the Particulars of Fraud and/ or misrepresentation. The issue of Fraud and/ or misrepresentation was also conclusively dealt with in Civil Suit No 157 of 2009 where the Learned Judge in Paragraph 56 of his Judgement stated:-

“it is also common ground and not disputed that the defendant over and above subscribing to the memorandum and articles of association paid to the company towards constructions sums of Kshs. 8,900,000/= which sum PW - 3, the Company accountant/auditor, said must be treated as a loan by directors to the company. It is therefore not in dispute that the Defendant set out to be a promoter of the company, did take shares and even advanced money for the construction of the developments on the suit land. From those particulars and the facts sought to infer the intention of the parties, nothing is fraudulent or misrepresentative. I find them to be honest acts of engagement by her with the other directors and cannot be proof of neither fraud nor misrepresentation.”

10. The same position was upheld by the Court of Appeal in Civil Appeal No.60 of 2018 when the learned judges in Paragraph 31 where they stated “We concur with the Learned Judge that the appellant did not prove fraud as against the respondent...”

11. The Learned Counsel rightfully submitted that the particulars of fraud and/or misrepresentation as contained in the Plaint were conclusively dealt with by this Honorable Court as well as the Court of Appeal. The suit before the Honourable Court offends provision 7 of the Civil Procedure Act which stipulates 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.”

12. The relevant test to determine whether a matter is *res judicata* was settled in the cases of “Nancy Mwangi T/A Worthlin Marketers v Airtel Networks (K) Ltd & others [2014] eKLR” and “Bernard Mugo Ndegwa v James Nderitu Githee & 2 others [2010]eKLR”;

“that the matter in issue is identical in both suits; the parties in the suit are the same; the claim/title is the same; the Court has concurrent jurisdiction and finality of the previous decision. He maintained that claim in the instant suit was determined by this Honorable Court in ELC No. 89 of 2018 touching on the same subject matter with similar parties litigating under the same title. That ELC No.89 of 2018 was dismissed on 12/10/2020 for want of prosecution hence the current ELC suit is in direct contravention of section 7 of the Civil Procedure Act.”



13. In the case of “*Henderson v Henderson* (1843) 67 ER 313” *res judicata* was described as follows:-

“...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 litigations in respect of a 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 pleas of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the 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.”

14. Courts of law have rendered a humongous number of rulings with regards to matters being *res judicata* and hence also express their displeasure upon the use of the courts to abuse processes. When it comes to the courts attention that indeed a matter is *res judicata*, then the court should not shy away from pronouncing itself so. In the case at hand the Plaintiffs filed a case against the Defendant being Civil Case No.157 of 2009. Hon. Judge P.J.O. Otieno dismissed the Plaintiff's suit against the Defendant and entered a Judgement in favor of the Defendant in the Counter claim. The Plaintiffs not being Satisfied, appealed in Civil Appeal 60 of 2018 where the same was dismissed as well as their application for review which was equally dismissed on account of having no merit.

15. It is quite baffling however that even after the above appeal having failed, the Plaintiff has gone ahead to file another suit involving the same parties and same subject matter which were already determined by a court of competent jurisdiction. The Learned Counsel challenged this Honourable court to be vigilant to litigants who transform to bring new suits or add others just to circumvent the doctrine of *res judicata*.

16. The Plaintiff futile attempt to bring in new issues if any, which they may have failed to bring up during the previous trials due to their negligence and inadvertence cannot be used as an avenue for a new trial because litigation must come to an end. This Honorable Court should frown upon such attempts and should such occur then the Court would be just in terminating the suit prematurely.

17. The Learned Counsel submitted that the Application before the Honourable Court is rightfully so due to the Plaintiff's suit which offends section 7 of the [Civil Procedure Act](#). The case of “*Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited* (1969) EA. 696” defined a preliminary objection as:-

“...a preliminary objection consists 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. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It 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.”

18. 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 the individual should not be harassed twice with the same account of litigation. This was stated in the Court of Appeal case of “[Nicholas Njeru v the](#)



Attorney General and 8 Others Civil Appeal No. 110 of 2011 [2013] eKLR”. This court of law should not fold its arms and allow the court process to be abused based on a suit being brought forward in bad faith and with the Plaintiffs having an iota of faith that this Honourable court would entertain a sanitized fresh suit that brings no new issue. The Plaintiffs herein have no other intention other than to ensure that litigation of the matter doesn’t end and to harass the Defendant.

19. From the above, in order for *res judicata* to suffice, the court should therefore look at the matter directly and substantially in issue in the subsequent suits 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.
20. In conclusion, the Learned Counsel invited the Honourable Court to go through Civil Case No. 157 of 2009 at the High Court at Mombasa and in Civil Appeal No.60 of 2018 as well as the Ruling in Civil Appeal No. 60 of 2018(Review) at the Court of Appeal in Mombasa. He further argued that on the face of it, the Plaintiff’s suit is simply but inviting the Honourable Court to waste no time in striking it out as it is frivolous, vexatious and an abuse of the court process.

III. The Legal Analysis and Determination

21. I have keenly considered the objection raised through the Notice of Preliminary Objection dated 7th June, 2023 by the Defendant/Objetor herein, the rival and detailed written submissions, the myriad authorities cited, the relevant provisions of the Constitution of Kenya, 2010 and statutes.
22. In order to reach at an informed, reasonable and fair decision on the matter, the Honorable Court wishes to be guided by the following three (3) issues for its determination. These are:-
 - a. Whether the objection raised by the Defendant through the Notice of Preliminary Objection dated 7th June, 2023 meets the threshold founded in Law and precedents.
 - b. Whether the Defendant is entitled to the relief sought from filed Notice of Preliminary Objection dated 7th June, 2023.
 - c. Who will bear the Costs of the Objection.

Issue No. a). Whether the objection raised by the Defendant through the Notice of Preliminary Objection dated 7th June, 2023 meets the threshold founded in Law and precedents.

23. Under this Sub heading, taking that the Defendant/Objetor has raised the issue of Sub - Judice, this Honorable Court will deal with it as a preliminary objection. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

24. The above legal preposition has been made graphically clear in the now famous case of “*Mukisa Biscuits Manufacturing Co. Ltd (supra)*” Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it 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 in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

25. I have further relied on the decision of “*Attorney General & another v Andrew Mwaura Gitbinji & another* [2016] eKLR”:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

- i. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
- iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

26. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. From the most of them of the issues and facts of contention in this objection are to be adduced during a full trial. For instance in that the Defendant holds that there is a similar matter pertaining the same parties in “Civil Case No. 157 of 2009 at the High Court at Mombasa and in Civil Appeal No.60 of 2018”.

27. Likewise, the Court in the case of:- “*Oraro v Mbaja* [2005] eKLR 141”, on the nature of preliminary objections observed that:

“A preliminary objection is now well identified 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 process 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. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

28. The Preliminary objection in this matter is founded on the notion that the Plaintiff has offended the provisions of section 7 of the *Civil Procedure Rules* as the current suit is *res judicata*. It will be necessary for this Honourable Court to peruse the proceeding in the High Court matter. That determination being a factual one, it cannot form the subject of a preliminary objection unless the facts are agreed. In that decision I relied on “*Oraro v Mbaja* (*supra*) in which Ojwang, J (as he then was) expressed himself as follows:

“A preliminary objection consists 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. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of



raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop... 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, 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. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the applicant’s instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a preliminary objection clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the respondent’s very detailed “affidavit in reply to an affidavit in support of preliminary objection”, which replying affidavit was expressed to be “under protest”... The applicant’s “notice of preliminary objection to representation” cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute.”

29. The preliminary objection is hinged on *res judicata* which is anchored section 7 of the [Civil Procedure Act](#). It provides that; -

“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.”

30. 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 the individual should not be harassed twice with the same account of litigation. This was stated in the Court of Appeal case of “[Nicholas Njeru v the Attorney General and 8 Others](#) Civil Appeal No. 110 of 2011 [2013] eKLR”.

31. It is my view that all the relevant facts as summarized above are not in dispute and the matter did not call for the exercise of the trial Court’s discretion. Resultantly therefore the objection is a pure point of law.

Issue No. b). Whether the Defendant is entitled to the relief sought from filed Notice of Preliminary Objection dated 7th June, 2023.

32. From the foregoing, it is clear that for *res judicata* to suffice, a Court should look at all the four corners set out above namely; 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.

33. Firstly, the matter in issue should be directly and substantially the same as in the former suit. A close look at the prayers in this instant look as shows that the suit property in both this instant suit and the suit that was determined by the High Court is Kwale/Diani Beach Block/1463 making it seemingly convincing that the suit property in both suits is the same. I want to further examine the prayers in both suits. In the instant the prayers are as follows beginning with the first prayer:
- a. A permanent injunction restraining the Defendant by herself, her agents and/or servants from selling, transferring, charging, leasing, alienating or in any way whatsoever and howsoever interfering with or dealing with the property known as Kwale/Diani Beach Block/1463.
34. This prayer is identical to the one contained in High Court Civil Case No. 157 of 2009 which was also filed by the Plaintiff/Respondent are as follows:
- a. A permanent injunction restraining the Defendant by herself, her agents and/or servants from selling, transferring, charging, leasing, alienating or in any way whatsoever and howsoever interfering with or dealing with the property known as Kwale/Diani Beach Block/1463.
35. Clearly the matter in issue in the instant suit is directly and substantially the same as the one in the former suit.
36. The second and third tests are closely intertwined. That the former suit must have been between the same parties or parties under whom they claim and the parties must have litigated under the same title. The parties in Mombasa High Court Civil Case No. 157 of 2009 are *Ushago Diani Investment Limited v Jabeen Manan Abdulwabab*, the same as the ones in the instant suit. It goes without saying that the parties in both cases are similar and indeed litigating under the same titles.
37. Lastly for res judicata to be sustained, the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided. It is not in dispute that judgment in Mombasa High Court Civil Case No. 157 of 2009 was delivered on 20th April, 2018 by my brother Hon. Justice P.J. O. Otieno where it was held that:

Rendition

- i. The plaintiff suit against the defendant is dismissed with costs.
- ii. Judgment is entered for the defendant against the plaintiff on the counterclaim in the sum of Kshs.5,208,000/= being reasonable rental income for 1/1/2008 till end of April 2018 which sum shall continue to grow at Kshs.42,000/= per month beginning 1/5/2018 provided the plaintiff continues to occupy and use the premises.
- iii. The sum so awarded shall attract interest at court rates with effect from the 1/5/2018 till payment in full.
- iv. I award costs of the counter claim to the defendant.
78. Now that this suit is concluded, parties may have the winding up cause prosecuted.
38. It is not in dispute that the Court seized with Mombasa High Court Civil Case No. 157 of 2009 had the requisite jurisdiction to determine the dispute therein. See article 162 of *COK* and section 13 *ELC Act*.



39. The gist of section 7 of the *Civil Procedure Act* defines the principle of *res judicata* to apply where the issues in the previous suit ought to have been “heard and finally decided.”
40. The *Black’s Law Dictionary* 10th Edition defines the terms “heard and determined” as follows:-
“of a case, having been presented to a Court that rendered Judgment.”
41. The term “hearing” is defined in the same dictionary as follows: -
“A judicial session usually open to the public held for the purpose of deciding issues of fact or of law sometimes with witnesses testifying.”
42. In the case of:- “*Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Limited* [2005] KLR 97” the Court stated:
“Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by *res judicata* when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. *res judicata* bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim.”
43. Resonating with the above decision, this Honourable Court observes that a judgment was rendered in Mombasa High Court Civil Case No. 157 of 2009 and hence by reason of that the Preliminary objection by the Defendant.

Issue No. c). Who will bear the Costs of the Objection

44. The *Black Law Dictionary* defines “Cost” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.
- Ideally, it is trite law that issues of Costs are at the discretion of the Honorable Court. The provision under the provisions of section 27 (1) of the *Civil Procedure Act*, cap. 21 holds that Costs follow events. By events it means the results and outcome of any legal action, proceeding or process in any litigation. In the case of “*Reids Hewett & Company v Joseph* AIR 1918 cal. 717 & *Myres v Defries* (1880) 5 Ex. D. 180, the House of the Lords noted:-
“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....”
45. The events in the instant case is that the Preliminary Objection raised by the Defendant/Objector herein has succeeded. For that very reason, the Defendant/Objector herein will have the Costs of the objection to be borne by the Plaintiff herein.

VI. Conclusion & Disposition

46. In conclusion, having conducted an intensive analysis of the framed issues herein, on preponderance of probability, the Honorable Court proceeds to make the following orders.



- a. That the Notice of Preliminary Objection dated 7th June, 2023, by the Defendant/Objector herein be and is hereby found to have merited and the same is hereby sustained with costs.
- b. That consequent to the suit being found to offend the doctrine of res judicata stands dismissed.
- c. That the costs of the objection be awarded to the Defendant/Objector.

It is so ordered accordingly.

RULING DELIVERED, SIGNED AND DATED AT MOMBASA THIS 27TH DAY OF SEPTEMBER, 2022.

.....

HON. MR. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

- a. M/s. Yumna, Court Assistant.
- b. No appearance Advocate for the Plaintiff/Respondent.
- c. No appearance Advocate for the Defendant/Objector

