

# IN THE HIGH COURT OF KIRIBATI

CIVIL CASE NO. 138 OF 2011

[IOSEFA KWONG	PLAINTIFF
[	
BETWEEN [AND	
[	
[ATTORNEY GENERAL IRO	
[MINISTRY OF LANDS	1 <sup>st</sup> DEFENDANT
[DOROTHY HIGHLAND WITH	
[BROTHERS AND SISTERS	2 <sup>ND</sup> DEFENDANTS

Before: The Hon Chief Justice Sir John Muria

5 July, 22 August, 28 August & 5 September 2017

*Ms Kiata Kabure* for Plaintiff

*Ms Bitarana Yeeting* for 1<sup>st</sup> Defendant

*Mr Banuera Berina* for 2<sup>nd</sup> Defendant

## JUDGMENT

**Muria, CJ:** The second defendant has raised the preliminary issue of *res judicata* in this case and has asked the Court to determine it before the case proceeds any further. No objection has been taken by either the plaintiff or first defendant as to whether the issue of *res judicata* should be determined as a preliminary matter or not at this stage of the proceedings. The Court will proceed on the basis that all parties have agreed to the issue of *res judicata* being determined by the Court as a preliminary issue in the present case.

P.C.S. [Signature] for JWC  
DATE

01/10/17

(13/10/17)

Only the second defendant and the plaintiff made submissions on the issue. The first defendant elected not to make any submission either for or against the issue of *res judicata*.

### **Brief background**

The plaintiff brought the present claim against the first defendant for failing to honour its promise to issue a sublease over part of the land Terawabono 820u. It is not clear on the pleadings what the basis is for the claim against the second defendant. It appears, however, that the plaintiff's complaint against the second defendant is concerned with the second defendant's taking possession of the plaintiff's building on the said land and renting it out to tenants.

The land concerned has had its share of litigation in the Magistrates' Courts, High Court and Court of Appeal. As a result of the cases over the said land, in particular, the 2005 case in CN 72/2005, the second defendant now relied on the principles of *res judicata* and claim that the plaintiff is now estopped from bringing the action against the second defendant.

### **The Second Defendant's Argument**

Mr Berina of Counsel for the second defendant submitted that the plaintiff is estopped from bringing the present action against the second defendant by operation of the doctrine of *res judicata*. The basis for the second defendant's claim of *res judicata* is CN 72/05. That case was brought before the Magistrates' Court by the second defendant against Fair Price Trading

Ltd for the removal of the extended part of the plaintiff's building from the second defendant's land.

The Magistrates' Court in CN 72/05 found that part of the building was on the Government's leased part of the land and the other part of the building was on the unleased part of the land. The land is owned by the second defendant. The Magistrates' Court ordered Fair Price Ltd to remove that extended part of the building from the second defendant's part of the land that was not leased to the Government.

I think it is important to point out that the building, sitting partly on the Government leased portion and partly on the unleased portion of the second defendant's land, belongs to the plaintiff. Fair Price Ltd rented the building and added extension to it that encroached onto the unleased portion of the second defendant's land. It was that extension that led the second defendant to bring CN 72/05 to have Fair Price Ltd removed that part of the building sitting on the second defendant's land. That, together with the second defendant's use of the plaintiff's building, were basically the reasons to have the second defendant dragged into this case which, to all intents and purposes, is between the plaintiff and first defendant.

It must be noted also that HCLR 23/07 was an application to review CN 72/05 but it was struck out for non-appearance by the applicant. The second attempt to review CN 72/05 was HCCC 35/08. That was also struck out for being out of time. An appeal to the KICA (Civ App. 2/09) was lodged against High Court decision in HCCC 35/08. The appeal was dismissed.

Having said all that, I return to the claim of *res judicata*. The argument for the second defendant is that decision of the Magistrates' Court in CN 72/05 and subsequent High Court and Court of Appeal cases bar the plaintiff from bringing the present action against the second defendant.

Counsel for the second defendant submitted that the parties to CN 72/05 were the same. It is said that the plaintiff, although not named as a party in that case, was the same party as in the present case. The argument is that Fair Price was really only the agent of the plaintiff and that Fair Price was simply acting on instructions from the plaintiff.

#### Principles of *res judicata*

The principles of *res judicata* have been developed by the common law to ensure that there is finality in litigation between disputing parties.

The doctrine of *res judicata* was once restricted to only decisions of Courts of record. The widening application of the doctrine has now led to the doctrine to be more described as "issue estoppel" applying it to decisions other than those of Courts of record. See *Carl-Zeiss-Stiftung -v- Rayner and Keeler Ltd and Others* (1966) 2 All ER 536 at 565G where Lord Guest stated:

"The requirements of issue estoppel still remain (i) that the same question has been decided; (ii) that the judicial decision which is said to create the estoppel was final, and (iii) that the parties to the judicial decision or their privies were the same persons as the

parties to the proceedings in which the estoppel is raised or their privies”.

It is the second defendant's case that the Fair Price Ltd was an agent of the plaintiff in CN 72/05 and as such the plaintiff must be regarded as party to that case. Mr Berina sought to buttress his argument by referring to the three subsequent cases HCLR No. 23/07 and HCCC 35/08 and Civ App. 2/09 in which the sister and brother of the plaintiff sought to challenge the decision in CN 72/05 through the High Court and Court of Appeal challenges. Mr Berina's contention, in so far as being a party is concerned, is that the plaintiff was a privy to the party (Fair Price Ltd) in CN 72/05.

When one looks at CN 72/05, HCLR 23/07, HCCC 35/08 and Civ App. 2/09, I think there is some force in Mr Berina's argument on the question of "Parties" to the case is concern. Fair Price Ltd went into the building under a tenancy agreement with the plaintiff, who received rents from Fair Price Ltd. The plaintiff had proprietary and financial interests in the dispute between the second defendant and Fair Price Ltd. These were manifested by the level of interest on the plaintiff's side when he, through his brother and sister, took on the controlling<sup>®</sup> interest to pursue proceedings to challenge the Court's decision in CN 72/05.

In my view, there is clearly a privity of interest between the plaintiff and the defendant (Fair Price Ltd) in CN 72/05. This accords with what Lord Guest stated in Carl-Zeiss-Stiftung at page 566:

**"Before a person can be privy to a party there must be community or privity of interest between them".**

The next question is whether the issues now raised by the plaintiff have already been determined by the Court as between the same parties in this case. The issue in CN 72/05 was concerned with the alleged consent of the mother of the second defendant to extend the plaintiff's building onto the unleased part of the second defendant's land.

The case for the second defendant in CN 72/05 was that consent was given to the plaintiff to build on the part leased by the Government. The plaintiff applied to the Government to sublease that part of the land leased to the Government. The Government promised the plaintiff that it will grant him sublease of the property. No sublease has yet been given to the plaintiff until today.

In the meantime the plaintiff had let out the building which housed the "Nite Spot" on the leased part of the land to Fair Price Ltd on rent. Having obtained occupancy of the building, Fair Price decided to extend the building and in doing so, extended the building onto the unleased part of the second defendant's land. The Court found that the extension encroached onto the unleased part of the second defendant's land and ordered the extended part of the building to be removed. The Court also found that the second defendant never gave any consent to extend the building onto the unleased part of the land.

In the present case, the plaintiff's claim is, in large measure, against the first defendant over the non-issuance of the promised sublease. The issue against the second defendant is that claimed in paragraph 31 of the Statement of Claim, namely:

**"31. The 2<sup>nd</sup> Defendants upon knowing the verbal private lease agreement between the Plaintiff and their late mother, they took advantage of the fact that there is no written private lease agreement and took ownership of the building".**

When one reads paragraph 31 together with paragraphs 6, 7, 8, 9 and 10 of the Statement of Claim, it is obvious that the plaintiff is still claiming that the second defendant's mother had given consent to the plaintiff to extend his building onto the unleased part of the land. That consent was said to be by way of an oral private lease between the plaintiff and second defendant's mother.

The issue of consent was raised in the Magistrates' Court in CN 72/05. The consent was said to be the "authority of the plaintiff's" (second defendants now) mother for the extension and the construction of the extension to the building. The Court found that the consent from the second defendant's mother was for the construction of the plaintiff's building on that part of the land leased by the Government and which the plaintiff applied to sublease. No consent was given by the second defendant's mother to extend the building onto the unleased part of her land. That finding of fact and law had been conclusively decided

between the parties and their privies. Appeals to the High Court and Court of Appeal against the Court's decision in CN 72/05 had been unsuccessful.

I rule that any reliance by the plaintiff on a claim of consent by second defendant's mother to the plaintiff concerning the extension of the plaintiff's building is barred by the operation of *res judicata*. The plaintiff is estopped from raising the issue of consent against the second defendants in the present case.

Having ruled that the plaintiff is estopped from relying on the issue of consent as against the second defendants, I feel that the second defendants are still not yet out of the woods in the present action, as suggested by Mr Berina in his submission.

The plaintiff claims damages against both defendants for whatever loss each of them has done to him. Apart from the issue of consent, the plaintiff complains in his Statement of Claim that the second defendants have taken control of his building and has rented it out to another businessman.

Whether the plaintiff has suffered loss arising out of the second defendant's action of controlling and renting the plaintiff's building is still a live issue in the present case. The plaintiff is therefore not precluded from bringing the action for damages against the second defendants over the use of the plaintiff's building..



I rule that:

1. The plaintiff is estopped from raising and relying on the issue of consent against the second defendant in the present case.
2. The plaintiff is not precluded from bringing the action claiming damages against the second defendants over the use of the plaintiff's building.

Dated the 29<sup>th</sup> day of September 2017



SIR JOHN MURIA  
Chief Justice