Jampen Enterprises Limited v NIC Bank Kenya PLC & another (Civil Suit 49 of 2018) [2022] KEHC 12164 (KLR) (23 May 2022) (Ruling)

Neutral citation: [2022] KEHC 12164 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 49 OF 2018

OA SEWE, J

MAY 23, 2022

BETWEEN

JAMPEN ENTERPRISES LIMITED ..... PLAINTIFF

AND

NIC BANK KENYA PLC ..... 1ST DEFENDANT

LEAKEY'S AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. This suit was instituted on the June 26, 2018by the plaintiff against the two defendants for a declaration that the 1st defendant's right of sale had not accrued; and that it was therefore being exercised illegally. The plaintiff also prayed for a permanent injunction barring the two defendants, their servants, agents, employees or any other person acting under their instructions from, in any way, advertising for sale, alienating, interfering, selling and/or in any way disposing of the plaintiff's property known as L.R. No. MN/section 1/14810 (C.R. No. 43860) Bamburi Area, Mombasa City; together with interest and costs.

2. Contemporaneously with the Plaint, the plaintiff filed an interlocutory application for a temporary injunction, dated June 21, 2018praying that:

> "...pending the final disposal of this suit, the plaintiff/applicant be granted a temporary injunction barring the defendant/respondent from interfering, selling, alienating, wasting and/or otherwise disposing of property known as Property L.R. No. MN/section 1/14810 (C.R. No. 43860) Bamburi Area, Mombasa City."

3. That application was heard and dismissed on November 29, 2019by Hon. P.J. Otieno, J. on the ground that the plaintiff had failed to prove a prima facie case to warrant the issuance of a temporary injunction as sought. The plaintiff, being aggrieved by that outcome, was desirous of pursuing an appeal. It

consequently filed a second application dated February 4, 2020 praying for a temporary injunction pending appeal. The second application was likewise heard and dismissed by Hon. Otieno, J. on May 8, 2020. The learned Judge took the view that:

> "...Having applied those applicable principles to the matter before me as disclosed in the Affidavit by the applicant, I have been unable to identify an arguable appeal before me... I do find that in the absence of an arguable point, there is no basis to grant an injunction pending appeal. I also find that the value of the property is known and may be ascertainable in the future with accurate mathematical certainty hence is capable of compensation by an award of damages. If the appeal succeeds after the property shall have been sold, the loss that shall have been visited upon the applicant would be the value of the property at the time of sale rather than the property itself.
>
> In the end, I find that no threshold for grant of an injunction pending appeal has been met and I thus order that the application dated 4/2/2020 be dismissed with costs for being bereft of merits..."

4. While it is not altogether clear whether the plaintiff pursued the intended appeal, it did file a third application herein on 29th July 2021, slightly over one year from the date of dismissal of its second application. The application was filed under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, Order 40 Rules 1, 2 and 3 of the *Civil Procedure Rules, 2010*; and is one of the two applications that are the subject of this ruling. The plaintiff thereby seeks the following orders:

   (a) The court does certify this application as urgent, service thereof be dispensed with in the first instance and it be heard ex parte. (spent)

   (b) Pending the inter partes hearing and determination of this application, the court does make an order restraining the 1st Defendant from transferring the title to the property known as L.R. No MN/Section 1/14810 (C.R No 43 860) or dealing with it in any manner whatsoever that may see the title to the property change ownership. (spent)

   (c) Pending the inter partes hearing and determination of this application, the court does order the 1st Defendant to furnish the Plaintiff with the following information and/or documents:

   (i) The most recent valuation report of the charged property;

   (ii) The public advertisement (s) for the sale of the charged property;

   (iii) The list of the people who attended the auction on June 17, 2021, their contacts, their bids and the successful bid;

   (iv) The auctioneer's charges for conducting the sale and any expenses related to the sale; and,

   (v) Updated account statement of the borrowers' loan payment.

   (d) Pending the hearing and determination of this suit, the court does make an order restraining the 1st Defendant from transferring the title to the property known as L.R. No MN/Section 1/14810 (C.R No 43860) or dealing with it in any manner whatsoever that may see the title to the property change ownership.

   (e) Costs of this application be provided for.

5. The plaintiff's Notice of Motion dated 29th July 2021, having been filed under Certificate of Urgency, was handled as such and orders granted on 30th July 2021, inter alia, that "...the prayer sought in paragraph 2 is hereby granted pending the hearing and determination of the application..." The ex parte orders impelled the 1st defendant to file the 4th application in this suit by way of the Notice of Motion dated 4th August 2021. It was filed by M/s Muriu, Mungai & Company Advocates on behalf of the 1st Defendant pursuant to Section 1A, 1B, 3, 3A & 63 (e) of the *Civil Procedure Act* and Order 40 Rule 7 of the *Civil Procedure Rules, 2010* for the orders that:

   (a) The application be certified urgent and service be dispensed with in the first instance. (spent)

   (b) The injunctive orders issued ex parte on July 30, 2021 or August 2, 2021be set aside for want of jurisdiction and for non-disclosure of material facts. (spent)

   (c) In the alternative and without prejudice to (b), this application be fixed for hearing inter partes on priority basis within fourteen (14) days or such other reasonable period.

   (d) The costs of this application be borne by the Plaintiff.

6. As directions were thereafter taken on August 6, 2021for the hearing of the two applications with the concurrence of Mr. Kongere, learned counsel for the defendants, he was to later concede in his submissions that the 1st defendant's application had been rendered moot; the alternative prayer having been granted by the Court (Hon. Njoki Mwangi, J.). Accordingly, and for completion of the record, I will not dwell on the 1st defendant's application dated August 4, 2021 as it has been overtaken by events, save to say that it is, in any case, entirely spent.

7. In respect of the Notice of Motion dated 28th July 2021, it was averred that the plaintiff is the registered owner of the property known as L.R. No. MN/Section 1/14810 (C.R. No. 43860) (hereinafter, "the suit property"); and that through a legal Charge dated 7th April 2015, the plaintiff charged it to the 1st defendant to secure the repayment of a loan of Kshs. 88,000,000/= together with interest that the 1st defendant had advanced to Apt Commodities Ltd (the borrower). It was further averred that, after taking the loan, the borrower encountered financial constraints and was therefore unable to repay the loan as per the terms agreed with the 1st defendant.

8. The plaintiff also mentioned that, on the June 22, 2021, it approached the 1st defendant with a request to preserve the suit property in order to give the borrower a chance to restructure its financial position and to enable the plaintiff to redeem the suit property. That on July 16, 2021, the 1st defendant responded to the plaintiff's request with information that it had sold the suit property by public auction on June 17, 2021; that the successful bidder had already paid 25% deposit and was expected to conclude the purchase within 90 days.

9. Thus, it was the contention of the plaintiff that the sale of the suit property was illegal, not only for failure by the 1st defendant to comply with the provisions of the *Land Act*, 2012; but also because the 1st defendant failed to obtain the best price for the suit property. The plaintiff also invoked the doctrine of lis pendens and expressed its trepidation that, unless the orders sought are granted, the defendants are poised to transfer or deal with the suit property in a manner prejudicial to the plaintiff and the interests of justice.

10. The application was supported by the affidavit of Peter Gachuru Ndichu, a director of the plaintiff. At paragraph 7 of his affidavit, Mr. Ndichu set out the particulars of the illegalities allegedly committed by the 1st defendant thus:

(a) The bank did not conduct a recent valuation of the suit property to determine the market value and the forced sale value of the charged property as required under Section 97(2) of the *Land Act*;

(b) The Bank did not share the valuation report with the plaintiff; neither did it disclose the market value and the forced sale value of the suit property to the plaintiff;

(c) The Bank did not advertise the suit property for sale;

(d) The Bank did not sell the charged property through a public auction;

(e) The Bank did not obtain the best price for the suit property at the time of sale; and therefore the proceeds of the sale will not cater for the amount being claimed by the Bank, and will only benefit the Bank and the auctioneers to the plaintiff's detriment; and,

(f) The Bank's sale of the suit property was against the doctrine of lis pendens.

11. Mr. Ndichu further averred, at paragraphs 9, 10 and 11 of his affidavit that the plaintiff was never informed by the defendants of the amount received from the sale of the suit property; hence its prayer that the 1st defendant be ordered to furnish it with the most recent valuation report done, the public advertisement for the sale, a list of the people who attended the auction, their contacts and bids. The plaintiff has also prayed for information as to the winning bid, the auctioneer's charges and any other expenses associated with the sale. Hence, the plaintiff's prayer was that the subject matter be preserved pending a detailed enquiry into all the aforestated matters by the Court at the hearing of the suit.

12. The 1st defendant opposed the application and filed a response thereto vide the Replying Affidavit sworn on September 9, 2021 by its Senior Legal Counsel, Mr. Stephen Atenya. The said affidavit was filed herein on September 16, 2021. He made reference to the first two applications filed herein by the plaintiff and their outcome. Hence, at paragraph 4 of his Replying Affidavit, Mr. Atenya deposed that the issue of non-compliance with Section 97 of the *Land Act* was considered and rejected in the ruling of November 29, 2019. Regarding the doctrine of lis pendens, Mr. Atenya averred that the same does not arise in the circumstances of this case; and if it did, must have been impliedly rejected in the two rulings delivered by Hon. Otieno, J.; and therefore that the instant application is *res judicata*.

13. On the merits of the application, Mr. Atenya averred that all the relevant provisions of the *Land Act* were complied with before sale of the suit property, in that:

(a) there was a forced sale valuation conducted on March 9, 2021;

(b) The suit property was advertised for sale on May 24, 2021;

(c) The public auction took place and Namuko Limited emerged as the successful bidder;

(d) Upon sale, the plaintiff's equity of redemption was extinguished.

14. It was consequently the assertion of the 1st defendant that whether or not the price obtained is the best price is not a ground for reversing a concluded sale; and that in any even the purchaser at the auction, having not been made a party to the instant application, cannot be condemned unheard. Annexed to the Replying Affidavit were copies of the valuation report dated March 9, 2021 by Milligan Valuers Ltd; the advertisement done on May 24, 2021 and the Certificate of Sale along with the Memorandum of Sale dated June 17, 2021 (marked as Annexures SA-4; SA-5 and SA-6).

15. In response to the prayer for documents, Mr. Atenya asserted that the information sought has been provided already as annexures to the Replying Affidavit; and that it would serve no useful purpose to

upset the sale since the plaintiff and the borrower are still indebted to the 1st defendant to the tune of Kshs. 197,467,013/=; the sale notwithstanding.

16. The plaintiff, through Mr. Ndichu, filed a Supplementary Affidavit on October 27, 2021to underscore its stance that the first two applications were fundamentally different from the current application; both in terms of the facts as well as the applicable legal principles. Mr. Ndichu specifically pointed out that the first application sought to have the defendants restrained from interfering, selling, alienating, wasting and/or otherwise disposing of the suit property; and that the second application prayed for a temporary injunction pending appeal. He therefore deposed that, since the instant application seeks to restrain the Bank from transferring the title to the suit property or dealing with it in any manner that may see the title to the property change ownership, the application cannot be *res judicata*, given the new facts and circumstances that have since arisen.

17. At paragraph 7 of the Supplementary Affidavit, Mr. Ndichu averred that courts across the country have taken judicial notice of the fact that the property market in Kenya appreciates steadily, no matter the location. He therefore posited that Bamburi area of Mombasa, where the suit property is situated, is no exception. He pointed out that there is a marked depreciation in value between the valuation posted in 2015 when the property was offered as security and in 2021 when it was valued for purposes of determining the forced sale value; which is indicative of deliberate undervaluation.

18. Mr. Ndichu also asserted that whereas the 1st defendant has supplied some of the information asked for by the plaintiff, not all the information sought has been availed. He pointed out that the defendants are yet to disclose the names of the people who attended the auction, their contacts or bids; or even the auctioneer's charges. He therefore reiterated the plaintiff's stance that a good case has been made out for the issuance of the orders sought in the Notice of Motion dated July 28, 2021.

19. The application was canvassed by way of written submissions; and to that end, the plaintiff's written submissions were filed herein on October 27, 2021by Ms. Kitoo, instructed by M/s Kitoo & Associates. She pointed out that at the heart of the plaintiff's application is the question whether Section 97 of the *Land Act* was complied with by the defendants before the impugned sale. She gave the background information to the application at paragraphs 2 to 15 of her written submissions and thereafter raised two broad issues for determination, namely: whether the application dated July 28, 2021 is *res judicata*; and if not whether the plaintiff is entitled to the orders sought therein.

20. Ms. Kitoo made reference to Section 7 of the *Civil Procedure Act*, which sets out the doctrine of res judicata; and while conceding that the Court has heard and determined two previous applications filed by the plaintiff in this suit, she disagreed that the issues raised in the instant application have been discussed and decided in the previous applications. In this regard, Ms. Kitoo relied on the averments set out at paragraph 3 of Mr. Ndichu's Supplementary Affidavit; and urged the Court to find that, on the basis thereof, the argument that the application is res judicata is untenable.

21. On whether the Bank obtained the best price for the property, Ms. Kitoo relied on *Simon Pasua Ole Kaanto & Another v Family Bank Limited* [2018] eKLR and *Grace Wangui Njoru & Another v Equity Bank Limited & Another* [2018] eKLR for the proposition that the property market in Kenya, as a matter of common knowledge, has been appreciating steadily, no matter the location; and that this is a fact that courts have taken judicial notice of. She therefore took issue with the sale price realized at the impugned auction, which reflected a depreciation margin of almost half of the initial value posted six years earlier when the property was accepted by the 1st defendant as security.

22. Thus, counsel submitted that the Bank owed the plaintiff a duty to obtain the best price reasonably obtainable at the time of sale of the suit property; and therefore that the plaintiff has demonstrated that it has a prima facie case against the bank that ought to go to trial. She relied on *Margaret Anyango*

t/a Jabalo Gardens v National Bank of Kenya Limited [2016] eKLR to underscore her argument that the plaintiff is entitled to the orders sought. In Ms. Kitoo's submission, it is in bad taste for the 1st defendant to brag about its ability to pay damages. She relied on several authorities at paragraphs 40 to 45 of her written submissions to support her argument that the 1st defendant ought not to be allowed to flout the law and thereafter flex its financial muscles in defiance, by offering damages in return.

23. In respect of the plaintiff's request for documents, Ms. Kitoo submitted that the plaintiff's expectation was that the prayer would be considered and granted before the hearing and determination of the application. She added that when the Court (Hon. Mwangi, J.) gave directions in the matter without giving consideration to that particular prayer, the matter went beyond the control of the plaintiff; and therefore the plaintiff should not be made to suffer prejudice. She urged the Court to conclude that the documents that are still outstanding are either unavailable or would be adverse to the defendants' case were they to be produced before the Court. She therefore submitted that there is considerable merit in allowing the application dated July 28, 2021.

24. On his part, Mr. Kongere suggested the following issues for determination, vide his written submissions dated October 27, 2021:

    (a) Whether the application dated July 28, 2021is *res judicata*;

    (b) Whether a prima facie case with probability of success has been made out by the applicant;

    (c) Whether the plaintiff will suffer irreparable harm unless the orders sought are granted;

    (d) Whether the 1st defendant should produce the documents asked for by the plaintiff.

25. In Mr. Kongere's submission, the plaintiff's argument that the previous applications for injunction were different from the instant one is fallacious. He gave an analogy, at paragraph 14 of his written submissions, to expose the absurdity of the argument that an application for injunction to restrain a chargee from exercising its statutory power of sale on the ground that no notice was served would be different from an application for injunction to stop completion of such sale by way of transfer. Thus, counsel relied on *Okiya Omtatah Okoiti & Another v Ministry of Transport & Infrastructure & 4 Others* [2016] eKLR for the proposition that the plea of res judicata applies, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce itself on, but also to every point which the parties, exercising reasonable diligence, ought to have brought forward at the time.

26. On whether the plaintiff has made out a prima facie case, Mr. Kongere submitted that in so far as the plaintiff now seeks to restrain the 1st defendant from transferring the suit property to the purchaser, the application comprises a deviation from the prayers set out in the Plaint. He cited *Lukas Njuguna S. Karobia v Consolidated Bank (K) Limited* [2005] eKLR and *Juja Coffee Exporters Ltd v National Bank of Kenya Ltd* [2019] eKLR in support of his argument that interlocutory orders which are at variance with the permanent orders sought ought not to be granted; and therefore that there is no prima facie case here to speak of.

27. The second limb of Mr. Kongere's submissions was that, granted the orders sought in the instant application, it was imperative for the plaintiff to join the purchaser, Namuko Limited, to its application since what is challenged is the transfer in favour of the purchaser. Counsel referred the Court to *Nabil Hassan v Daniel Odindo Waga* [2014] eKLR in which it was held that failure to join the purchaser of the property was fatal as a Court of law cannot act in vain. On this score, counsel took the view that the plaintiff has utterly failed to demonstrate a prima facie case with probability of success.

28. On whether the plaintiff stands to suffer irreparable injury, Mr. Kongere argued that where a charged property has been sold, as is the case herein, the only remedy available to a chargor who alleges irregular exercise of the chargee's statutory power of sale is in damages as envisaged under Section 99 of the *Lands Act*. He relied on *Etrade Limited & Another v Thrift Estates Limited & 2 Others* [2019] eKLR in which it was held that:

> "That section now statutorily encompasses the right of the chargor prejudiced by unauthorized, improper or irregular exercise of the power of sale to have a remedy in damages. In my view, such is where the plaintiff's remedy lies in this case."

29. Lastly, it was the submission of Mr. Kongere that the plaintiff's prayer for documents is untenable because it was not correctly worded. He posited that in so far as the plaintiff sought that order "...pending the hearing and determination of the application..." it is incapable of being granted as the prayer is long spent. The case of *Catherine Njeri Macharia v Macharia Kagio & Another* [2013] eKLR was cited to support the argument that, ordinarily, an interlocutory order is granted pending something other than the application itself; and therefore that no useful purpose would be served by granted the order at this point in time. Thus, the Court was invited to find that the plaintiff's Notice of Motion dated 28th July 2021 is devoid of merit and is therefore for dismissal.

30. I have given due consideration to the application, the averments set out in the affidavits filed herein by the parties as well as the written submissions made by learned counsel. In my view, the following issues arise for determination:

    (a) Whether the application dated 28th July 2021 is res judicata;

    (b) Whether the plaintiff has made out a good case for the grant of a temporary injunction pending the hearing and determination of this suit;

    (c) Whether the 1st defendant should produce the documents asked for by the plaintiff.

31. With regard to the plea of res judicata, Section 7 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, does provide that:

> "No court shall try any suit or issue in which the matter 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...and has been heard and finally decided by such court."

32. Thus, the test in determining whether a matter is *res judicata* was well laid in the case of *DSV Silo v The Owners of Sennar* [1985] 2 All ER 104 as applied in the Kenyan case of *Bernard Mugo Ndegwa v James Nderitu Githae and 2 others* [2010] eKLR. Such an applicant must show that:

    (a) The matter in issue is identical in both suits;

    (b) That the parties in the suit are substantially the same;

    (c) There is a concurrence of jurisdiction of the court;

    (d) That the subject matter is the same; and,

    (f) That there is a final determination as far as the previous decision is concerned.

33. Needless to mention that the res judicata principle is as applicable to main suits as it is to interlocutory applications. Hence, in *Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others*) Civil Appeal No. 36 of 1996), the Court of Appeal held that:

> " There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature in India and our *Civil Procedure Act*. That is to say, there must be an end to applications of a similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation..."

34. The record of the Court is plain that the plaintiff has had two of its applications for temporary injunction heard and dismissed by the Court; and that this is the third such application. In his Supplementary Affidavit, Mr. Ndichu correctly presented the context as follows:

(a) The application dated June 21, 2018sought a temporary injunction to restrain the defendants from interfering, selling, alienating, wasting and/or otherwise disposing of the suit property pending the hearing and determination of the suit on grounds that the plaintiff was not in default; and the Bank had never served it with any statutory notice. The Court dismissed that application vide the ruling of November 29, 2019and held that the Bank had carried out a current valuation; that there was evidence of service of the statutory notice and that there was indeed evidence of dispatch of the notices to the correct address.

(b) After the court dismissed that application, the plaintiff filed the application dated February 4, 2020 seeking an injunction pending appeal. The Court dismissed the second application vide the ruling of May 8, 2020 and held that the plaintiff did not have an arguable appeal.

(c) There being no court orders to stop the Bank from selling the suit property, it was sold; thereby prompting the filing of the instant application to restrain the Bank from transferring the title to the suit property or dealing with it in any manner that may see the title to the property change ownership on the ground that the Bank did not obtain the best price for the property at the time of the sale.

35. Thus, while the first two applications sought to restrain the sale of the charged property, the instant application is specific to the aspect of transfer; seeing as the sale has already taken place. It was in that respect that Ms. Kitoo set out to convince the Court that the circumstances have since changed and therefore that the instant application cannot be caught by the web of *res judicata*. Mr. Kongere countered that argument by relying on *Lukas Njuguna S. Karobia v Consolidated Bank (K) Ltd* (supra) in which Hon. Ochieng, J. quoted the following excerpt from the decision of Hon. Ringera, J. (as he then was) in HCCC No. 630 of 2001: *Dismas Oduor Owuor v Housing Finance Co. (K) Ltd & Another*:

> " The Plaintiff, in my opinion, cannot be granted interlocutory orders which are at variance with the permanent orders sought. I think he goofed in not amending his plaint before amending the chamber summons. He could not be allowed to injunct a transfer by the charge to the auction purchaser without amending his plaint to challenge the auction sale complained of."

36. It is noteworthy however that one of the prayers in the plaintiff's Plaint, at paragraph [b] thereof is:

> " A permanent injunction barring the 1st and 2nd defendants, their servants, agents, employees or any other person acting under their instructions from, in any way, advertising for sale, alienating, interfering, selling and/or in any way disposing of the plaintiff's property known as L.R. No. MN/section 1/14810 (C.R. No. 43860) Bamburi Area, Mombasa CITY." (underlining supplied)

37. The same prayer was replicated in the initial application dated June 21, 2018. Now, "alienation" according to *Black's Law Dictionary, 10th Edition* is defined to mean: "conveyance or transfer of property to another." While to "alienate" means to transfer or convey (property or a property right) to another."

38. There is therefore nothing inconsistent between the injunctive orders sought by the plaintiff herein and the prayer for permanent injunction sought in the Plaint dated 21st June, 2018. Moreover, I tend to agree with the position taken by Hon. Ngugi, J. in the case of *Symon Gatutu Kimamo & 587 Others v East African Portland Cement Co. Ltd* [2011] eKLR, made it clear that:

> " ...this is not a blanket rule that an application for temporary injunction is incompetent as long as the Plaint or other originating pleading in the main suit does not contain a predicating permanent injunction in the same terms as those prayed temporarily. That requirement does not appear anywhere in Order 40, Rules 1 and 2. It is also not the principle Justice Ringera enunciated in this later case. The rule that emerges in the Dismas Owuor Oduor Case is that an interlocutory injunction cannot be granted if the orders sought are at variance with the permanent orders sought..."

39. That said, it would follow that the argument by Ms. Kitoo that new circumstances had arisen after the sale of the property cannot hold, for the simple reason that sale and transfer are components of alienation of property; which was one of the prayers set out in the initial application. It is also noteworthy that compliance with Section 97 of the *Land Act* featured prominently in the first application and that the Court came to the conclusion, at paragraph 15 of the ruling dated November 29, 2019, that there was compliance. Likewise, in respect of the second application for temporary injunction pending appeal, Hon. Otieno, J. took the view that:

> " ...the value of the property is known and may be ascertainable in the future with accurate mathematical certainty hence is capable of compensation by an award of damages. If the appeal succeeds after the property shall have been sold, the loss that shall have been visited upon the applicant would be the value of the property at the time of sale rather than the property itself."

40. In the premises, I take the view that the plaintiff's recourse ought to have been on appeal from the ruling dated November 29, 2019; and that coming back to this Court for the same orders that have been declined in a similar application before by a court of concurrent jurisdiction is impermissible by virtue of the doctrine of res judicata. Indeed, as was pointed out in *Okiya Omtatah Okoiti & Another v Ministry of Transport & Infrastructure & 4 Others* (supra)

> " The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment on, 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..."

41. In the same vein, Hon. Majanja, J. expressed the view, in *E.T. v Attorney General & another* [2012] eKLR, with which I entirely agree, and which view is equally applicable to applications by parity of reasoning, that:

> "...The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff is in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and Others [2001] EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J., in the case of Njangu v Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata ...."

42. In the premises, I find it superfluous to engage in a consideration of the question as to whether or not a good case has been made out by the plaintiff for the grant of a temporary injunction or whether the prayer for documents is tenable. The application being incompetent from the standpoint of Section 7 of the *Civil Procedure Rules*, is hereby struck out with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF MAY 2022.

OLGA SEWE

JUDGE