



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Giddie v Bhatti & 2 others; Msanaka Investments Ltd (Objector); Mbeki Auctioneers (Respondent)
(Civil Case 231 of 2015) [2022] KEHC 15889 (KLR) (Civ) (29 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15889 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 231 OF 2015

JK SERGON, J

NOVEMBER 29, 2022

BETWEEN

KAMAL S GIDDIE PLAINTIFF

AND

MEHREEN BHATTI 1ST DEFENDANT

MEHERISH BHATTI 2ND DEFENDANT

SHAMA ASIF 3RD DEFENDANT

AND

MSANAKA INVESTMENTS LTD OBJECTOR

AND

MBEKI AUCTIONEERS RESPONDENT

RULING

1. The plaintiff/applicant herein has brought the notice of motion dated August 2, 2022 supported by the grounds set out on the body thereof and the facts stated in the affidavit of Kulvinder Singh Sihra. The applicant sought for the following orders:
 - i. Spent
 - ii. Spent.
 - iii. That this honourable court be pleased to make a declaration that the goods proclaimed by Mbeki Auctioneers, the 2nd respondent herein vide a proclamation notice dated July 15, 2022 belong the objector herein.



- iv. That this honourable court be pleased to lift and/or set aside the proclamation dated July 15, 2022 by Mbeki Auctioneers, the 2nd respondent herein on instructions from the plaintiff, in its entirety.
- v. That the costs of this application be provided for.
2. The plaintiff/respondent opposed the motion by filing the grounds of opposition dated June 10, 2020 whereby he stated that the objector has failed to establish any legal and or equitable interest with regard the proclaimed goods namely two fridges, washing machine, complete six seater table, pair of sofa set, TV set, microwave, toaster or any other asset found in the premises where the goods were proclaimed from.
3. The respondent further stated that the tenancy agreement produced as annexure 2 by the instant objector herein was within the previous objectors (Zhakan Bhatti) knowledge and was not produced by him at the time when he instituted the objection proceedings which were determined by way of a ruling dated May 17, 2022.
4. The respondent further filed a notice of preliminary objection dated August 23, 2022 and raised the ground that the instant motion is frivolous, vexatious, totally misplaced, gravely misconceived, fatally, an abuse of court process and is res-judicata.
5. When the parties attended court, directions were given that the preliminary objection and the instant motion be heard and determined together. Consequently, the parties put in written submissions on the same.
6. I have considered the grounds featuring on the face of the motion; the facts deponed in the supporting affidavit; the preliminary objection and the grounds of opposition thereto; and the rival written submissions placed before me.
7. A brief background of the matter as seen in the record is that the plaintiff/decree holder instituted a suit against the applicant *vide* the plaint dated June 22, 2015 and sought for a written equivocal apology, an injunction and damages arising out of the tort of defamation.
8. Upon hearing the parties, judgment delivered on December 13, 2019 was entered in favour of the plaintiff/respondent holder against the defendants jointly and severally in the sum of Kshs 3,000,000/=.
9. On July 23, 2021, the plaintiff /respondent proclaimed and subsequently attached the 1st and 2nd defendants movable properties in execution of the decree issued herein on June 9, 2021 against the defendants.
10. Being aggrieved by the aforementioned proclamation the applicant/objector then Zhakan Bhatti filed an application for stay which was dismissed due to the fact the applicant had not established the propriety interest in the goods attached. Being aggrieved by the aforementioned decision the objector (Msanaka Investments Limited filed this application.
11. Returning to the matter at hand, I will first make a determination on the preliminary objection which is premised on the argument that the motion is res judicata.
12. In its submissions, the applicant submitted that the subject applications does not in any way offend the doctrine of res judicata as the parties in the two applications are completely different for the reason, the objector is a stranger to the aforesaid application dated July 28, 2021 as it was neither a party to the



application nor the main suit thus was not in any whatsoever privity to the determination of the alleged application dated May 17, 2022.

13. The applicant relied on the case of *Susan Ndunge Maingi v Dee Properties Limited & 4 Others (2022) eKLR* wherein the learned judge held as follows:

“for the doctrine of res judicata to apply, the former suit must have been between the same parties as those in the current suit, or between parties under whom they or any of them claim, litigating under the same title. The 1st defendant/applicant was not a party in the former suit neither are they parties under whom any of the parties in the former suit claim. It is for the above reasons that I hold and find that this suit is not res judicata. I therefore find that the 1st defendant’s application dated August 26, 2020 lacks merit and the same is dismissed with costs.

14. In response, the plaintiff/respondent submitted that the previous applicant in the application dated July 28, 2021 is clearly not the same as in this application herein but the issues directly and substantially in issue in the application herein are common and similar to those raised in the previous application and that applicant herein is litigating under the same title as in the previous application and therein lies the nexus of the two applications and the issue of res judicata.

15. The plaintiff/respondent further submitted that the previous applicant ought to have brought forward as part of the subject in contest in the previous application the issue of the applicant herein being the owner of the proclaimed goods in the notice of July 23, 2021 which goods are similar to those proclaimed in the notice of July 15, 2022 and that the applicant herein cannot be allowed to reopen the same subject that was contested in the previous application.

16. The plaintiff/respondent relied on the case of *Diocese of Eldoret Trustees (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) & another 2020 eKLR* where the court relying on the case of *Henderson v Henderson (1843) 67 ER 313* addressed the issue of res- judicata as follows

“Courts must always be vigilant to guard against litigants who metamorphosis to bring suits as new litigants or add others to circumvent the doctrine of res judicata. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit. It actually worsens the situation by making the suit terminate prematurely vide a preliminary objection.

I find that this suit is res judicata and an abuse of the court process. The preliminary objection has merit and hence upheld. Plaintiff’s case is dismissed with costs.”

17. The plaintiff/respondent therefore contends that no proper documents of ownership like receipts, invoices, delivery notes and purchase documents in respect of the attached properties in question have been placed before this court to show that the properties legally belong to the applicant and that a tenancy agreement is proof of ownership of the promises and not proprietary interest in the attached or proclaimed goods .

18. The respondent has relied on the case of *Zingo Investment Limited v Miema Enterprises Limited (2015) eKLR* where the court noted that :

“It is our considered view that title documents or ownership of premises is not by itself sufficient in objection proceedings; there must be ample documentation of ownership of attached items. The issue is not ownership of premises but proprietary interest in the



attached goods. If this were not the case landlords may well become objectors whenever a tenant's goods are proclaimed and this cannot be the law.”

19. Reference is made to the case of *Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696* cited in the submissions by the respondent, where the court defined the term ‘preliminary objection’ in the following manner:

“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 in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”

20. This is a preliminary objection raised on a point of law on the grounds that this matter is res judicata. The issue for determination is whether this suit falls on all fours of section 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.”

21. The plaintiff's contention that this matter is that the applicant herein is litigating under the same title as in the prior application, and that there is a connection between the two applications and the question of res judicata despite the fact that the previous applicant in the application dated July 28, 2021 is obviously different from the applicant herein.

22. The issue of the applicant herein being the owner of the goods proclaimed in the notice of July 23, 2021, which goods are similar to those proclaimed in the notice of July 15, 2022, should have been included as part of the subject in dispute in the prior application, and that the applicant herein cannot be permitted to reopen the same subject that was contested in the prior application.

23. Having considered the material placed before this court it is clear also that it has not been proved that the attached properties in question legally belong to the applicant and that a tenancy agreement is evidence of ownership of the premises and not proprietary interest in the attached or proclaimed goods, proper documents of ownership like receipts, invoices, delivery notes, and purchase documents have not been presented to the court.

24. In [Dubai Bank \(K\) Ltd v Come Cons Africa Ltd and Impak Holdings Co Ltd \(2012\) eKLR](#) the High Court correctly expressed itself thus:

“Although the law is that in the objection proceedings the court does not and cannot make a finding as to the ownership of the property the subject of the objection proceedings, but simply decide whether or not the objector has interest legal or equitable in the attached property, it is equally true that the onus of proof in objection proceedings is on the objector to establish ownership see *Chatabhai M Patel & Another HCCC No 544 Of 1957* (Lewis) On Decemeber 8, 1958 Hcu (1958) 743.

25. I find that the application dated August 2, 2022 is res judicata and an abuse of the court process. The preliminary objection therefore has merit and hence upheld. The objector's application is dismissed with costs.



**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
29TH DAY OF NOVEMBER, 2022.**

.....

J K SERGON

JUDGE

In the presence of:

..... for the plaintiff/1st respondent

..... for the 1st defendant

..... for the 2nd defendant

..... for the objector/applicant

.....for the 2nd respondent

