



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**MISCELLANEOUS CIVIL APPLICATION NO 339 OF 2018**

**MICHAEL MUNGAI.....APPLICANT**

**VERSUS**

**HOUSING FINANCE C (K) LTD (HF GROUP).....1<sup>ST</sup> RESPONDENT**

**KENYA BUILDING SOCIETY LTD (HF GROUP).....2<sup>ND</sup> RESPONDENT**

**TAIFA AUCTIONEERS.....3<sup>RD</sup> RESPONDENT**

**CHRISTOPHER AVISA.....4<sup>TH</sup> RESPONDENT**

**KENYA COMMERCIAL BANK LTD.....5<sup>TH</sup> RESPONDENT**

**CLEOPHAS OGUTU, MILLER & CO ADVOCATES**

**AND OTHERS.....6<sup>TH</sup> RESPONDENT**

**RULING**

1. The Applicant lodged a Notice of Motion application dated 11<sup>th</sup> June 2018 on even date. It was supported by his Supporting Affidavit that was also sworn on the same date and two hundred and forty one (241) annexures. His Certificate of urgency also dated 11<sup>th</sup> June 2018 was seeking that the Respondents be punished for contempt of court and contempt related offences (sic). He set out a chronology of his case in the said Certificate of urgency and Notice of Motion application. He annexed a copy of a letter dated 2<sup>nd</sup> March 2017 from the Registrar of the Supreme Court advising him that the Honourable Chief Justice had directed that he be informed that his application to the Supreme Court had been struck out and that there was no administrative intervention that his Lordship could take to revive his matter.

2. In his said Notice of Motion application, he sought orders **THAT:-**

**a. The High Court order the Chief Magistrate Court Milimani to transfer their file DM Div 122 of 1997 to the High Court for purposes of executing the lawful orders, directives, rulings, notices, warnings etc (sic) by the High Court, Court of Appeal and the Supreme Court of Kenya (DCJ) and (CJ) sic.**

**b. That the court gives leave to the Applicant/Complainant to file the application dated 7<sup>th</sup> June 2018 in Civil Appeal No HCCA 335 OF 1997 for the purposes of execution and enforcement of the lawful orders, rulings, warnings, notices, decrees, bills, certificates etc (sic) and the other issues/applications that are hanging in that file.**

**c. That the costs of this Application, prosecution and action be provided against the above offenders and their agents, jointly and severally.**

**d. That the court grants any other relief that it deems fit to grant the Applicant/Complainant (High Court Decree Holder) against the offenders jointly and severally.**

3. The said application was filed pursuant to several provisions in the Penal Code, Criminal Procedure Code, Civil Procedure Code, the Constitution of Kenya, AG Act and ODPP Act as read with all other enabling powers of law and statutes.

4. In his Notice of Motion application, he alluded to several cases that he had filed and had been decided. He stated that the orders that were issued by Seron J dated 6<sup>th</sup> April 2018 were blocking the enforcement of earlier lawful orders that were issued in **HCCA No 335 of 1997** and in **HCCR No 196 of 2018**. He said that these orders that could not be enforced were issued by the High Court, Court of Appeal and Supreme Court.

5. He pointed out that in **HCCA No 335 of 1997**, Mbogholi Msagha J found that the Respondents were using the courts and police to oppress him. He termed his case as being the most expensive because of the confusion that had occurred herein over the years. The learned judge, he stated, reinstated the *status quo*.

6. In his Supporting Affidavit, he stated that the Respondents and/or their agents had forcefully occupied his matrimonial home and taken away his documents, tools and assets which they were trading with without accounting for the profits. It was his contention that the losses, costs and damages had continued to grow and accumulate daily. He also denied having taken a loan of Kshs 282,060/= from the 1<sup>st</sup> Respondent herein, which he said, the High Court and the Court of Appeal found that the same did not exist.

7. He was pleading with this court to set aside and/or vary the Ruling by Wanjala and Ibrahim SC JJ that was delivered on 26<sup>th</sup> January 2017, in the interest of justice, fairness and the rule of law and order.

8. This court tried as much as possible to capture what was contained in his Supporting Affidavit and determined that the above fairly represented the Applicant's case.

9. M/S Laichena Mugambi & Co Advocates were representing the 1<sup>st</sup> Respondent. They filed Grounds of Opposition dated 4<sup>th</sup> September 2018 on 6<sup>th</sup> September 2018. The Grounds of Opposition were as follows:-

1. **THAT the Honourable Court lacked jurisdiction to hear and determine the claim and application.**
2. **THAT the instant application as it is raised issues emanating from judgments and determination from different courts and jurisdiction which this court is not ceased of or privy to.**
3. **THAT the application as filed and the entire claim were res judicata and sub judice.**
4. **THAT the Applicant was trying to invite the Honourable Court to determine issues which arised in a different suit being:-**
  - a. **HC Misc Cr Application Number 196 of 2018.**
  - b. **CM Misc Cr Application Number 1882 of 2018.**
  - c. **SC No 9 of 2015.**
  - d. **CA No 288 of 2008.**
  - e. **HCCA No 335 of 1997.**
  - f. **HCCC No 17 and 3 of 2001.**
  - g. **HCCC No 1026 of 2001.**
  - h. **HCCC No 779 of 2009.**
  - i. **HCJR No 9 of 2015.**

10. The Applicant's Written Submissions were dated and filed on 15<sup>th</sup> January 2019. He also filed Submission highlights (**sic**) dated 6<sup>th</sup> February 2019 on even date. The 5<sup>th</sup> Respondent's Written Submissions and List and Bundle of Authorities were dated 7<sup>th</sup> May 2018 and filed on 10<sup>th</sup> May 2019. This court did not see the 1<sup>st</sup> Respondent's Written Submissions on the court record.

11. On 25<sup>th</sup> April 2019, the Applicant requested that this court look at **HCCA No 335 of 1997** so that it could understand the case. Counsel for the 1<sup>st</sup> and 5<sup>th</sup> Respondents did not object to his request.

12. When the matter came up on 13<sup>th</sup> May 2019, they asked this court to rely on their respective Written Submissions and deliver a Ruling in respect of the Applicant's Notice of Motion application dated 6<sup>th</sup> June 2018 and 11<sup>th</sup> June 2018 but both filed on 11<sup>th</sup> June 2018 together with the 5<sup>th</sup> Respondent's Preliminary Objection dated 18<sup>th</sup> December 2018 and filed on 25<sup>th</sup> January 2019.

## **LEGAL ANALYSIS**

13. Right at the outset, this court noted that in its decision delivered on 22<sup>nd</sup> January 2015 involving the same parties herein, **Michael**

**Mungai vs Housing Finance Co (K) Ltd and 4 Others [2015] eKLR**, it dismissed the Applicant's claim against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> and 5<sup>th</sup> Respondents. In fact, this court observed in that case that the Applicant did not explain how the 5<sup>th</sup> Respondent was connected to the matter herein.

14. It also noted that the case of **Michael Mungai vs Housing Finance Co (K) Ltd & 6 Others [2018] eKLR** that was filed in the High Court Criminal Division was withdrawn to enable the Applicant file a private criminal prosecution against the Respondents therein which included the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents herein.

15. In the case of **Michael Mungai vs Housing Finance Co (K) Ltd & 5 Others [2017] eKLR**, the Supreme Court struck out the Applicant's application on the ground that the same ought not to have been filed in the first place as the court had to set boundaries on what matters it could admit for hearing so as to assert its authority and seriousness.

16. It was therefore the view of this court that right from the beginning, the Applicant could not sustain a claim against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents, a determination having been made to that effect. In addition, he could also not sustain a claim against the 4<sup>th</sup> Respondent as it was evident from my decision of 22<sup>nd</sup> January 2015 that the 4<sup>th</sup> Respondent had been struck out from the pleadings therein.

17. As the issues the Applicant has raised herein were the same issues that he had raised against the Respondents herein in 2015, this matter was clearly *res judicata* as has been set out in Section 7 of the Civil Procedure Act Cap 21 (Laws of Kenya) that provides that:-

**“No court shall try any suit 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 can 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 that court.”**

18. In that regard, this court fully associated itself with the holding that was pronounced by the Court of Appeal in the case of **Jane Florence Maritime Services Ltd & Another vs Cabinet Secretary for Transport & Infrastructure & 3 Others [2015] eKLR** THAT:-

**“The doctrine of *res judicata* has two dimensions cause of action *res judicata* and issue *res judicata*. *Res judicata* based on a cause of action arises where the cause of action in the latter proceedings...issue *res judicata* may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided...”**

19. This court therefore agreed with the 5<sup>th</sup> Respondent that the present application was *res judicata* both in cause of action and issue and could not be sustained. The 1<sup>st</sup> Respondent's grounds were also meritorious as it had also argued that this matter was *res judicata*. In fact, this court could not also set aside and/or vary the decision of the Supreme Court as the Applicant had sought due to the hierarchical nature of courts in our jurisdiction.

20. This court noted that the Applicant was required to deposit security for costs as could be seen in **Michael Mungai vs Housing Finance Co (K) Ltd & 4 Others [2018] eKLR**. However, that was ordered in the Court of Appeal.

21. Having said so, this court perused **HCCA No 335 of 1997 Michael Mungai vs Housing Finance Co (K) Ltd** and noted that in his Ruling of 6<sup>th</sup> April 2018, Serгон J observed that Ogola J had at one point directed that the Applicant would have to pay security of Kshs 100,000/= every time he filed an application. In his decision, Serгон J directed that no application would be filed by the Applicant without leave of the court. That was one of his prayers in the present application to be granted leave to file an application.

22. Serгон J was very clear that any remedy in the Appeal case would only be against the Respondent, Nancy Wanjeri, and not the Respondents herein who were not parties to the said Appeal **HCCA No 335 of 1997**.

23. A perusal of the Ruling of Okwengu J (as she then was) that was delivered on 16<sup>th</sup> October 2018 shows that in **HCCA No 335 of 1997**, judgment was delivered in favour of the Applicant on 13<sup>th</sup> July 2018 and subsequently, his Bill of Costs was taxed and he was awarded a sum of Kshs 311,920/=. This court did not see the judgment in the file. It did not also see the Memorandum of Appeal.

24. However, just as Okwengu J (as she then was) and Sergon and Njuguna JJ found in **HCCA No 335 of 1997**, the proceedings in the Appeal had been finalised and the court was thus *functus officio*. Further, the Applicant could not proceed against the Respondents herein as they were not parties to the Appeal.

25. A further perusal of the proceedings in **HCCA No 335 of 1997** also showed that the Taxing Master awarded the sum of Kshs 311,290/= all inclusive against the Respondents on 10<sup>th</sup> March 2006. The Applicant requested for an enhancement of the costs to which the Taxing Master directed that the Applicant file a reference before a judge.

26. On 18<sup>th</sup> January 2007, O.K Mutungi J (as he then was) observed that the 4<sup>th</sup> and 5<sup>th</sup> Respondents were brought in error in the taxation as they were never parties to the case and that there was no law that allows a non-party to be dragged into taxation. The 4<sup>th</sup> and 5<sup>th</sup> Respondents were therefore released from the taxation at that time.

27. On 27<sup>th</sup> November 2012, Hon A K Ndungu DR dismissed the Applicant's application on the ground that the sum of Kshs 311, 290/= was only as against Nancy Wanjeri and not the Respondents herein. On 16<sup>th</sup> March 2015, Hon A K Ndungu reiterated the said position and stated that the earlier Certificate of Costs against the Respondents herein was cancelled as they were not parties to the Appeal herein.

Njuguna and Serгон JJ came to the same conclusion.

28. Accordingly, having perused the Applicant's affidavit evidence, the enclosures therein and his Written Submissions as well as those Written Submissions of the 5<sup>th</sup> Respondent, this court also came to the conclusion that only was this matter *res judicata*, this very court having determined that the Applicant did not prove his case against in **Michael Mungai vs Housing Finance Co (K) Ltd & Others [2015] eKLR**, this court could not see which redress the Applicant was seeking against the Respondents herein in this Miscellaneous application. His case was clearly set out.

29. It was also not clear what the Respondents had to do with the **Divorce Cause No 122 of 1997** and which orders and rulings were to be executed. The Applicant failed to show a nexus between the said case and the Respondents herein. The Amended Certificate of costs issued on 6<sup>th</sup> February 2008 was against Nancy Wanjeri alone.

30. This court could not deal with leave to file an application in **HCCA No 335 of 1997** in this file as it was a different and distinct matter. The Applicant is best advised to file that application for leave in the proper file.

#### **DISPOSITION**

31. For the foregoing reasons, this court came to the conclusion that the Applicant's Notice of Motion applications dated 7<sup>th</sup> June 2018 (previously indicated as 6<sup>th</sup> June 2018) and 11<sup>th</sup> June 2018 were not merited and they are hereby dismissed with costs to the 1<sup>st</sup> and 5<sup>th</sup> Respondents. The 5<sup>th</sup> Respondent's Preliminary Objection is hereby upheld.

32. As he did not demonstrate to this court that its decision delivered on 22<sup>nd</sup> January 2015 in **Michael Mungai vs Housing Finance Co (K) Ltd & 4 Others [2015] eKLR** had been overturned by the Court of Appeal, it was this court's considered opinion that the proceedings herein were vexatious to the Respondents herein.

33. To avoid abusing the court process, this court hereby directs that the Applicant deposits a sum of Kshs 150,000/= every time he files an application against the Respondents herein in this matter to safeguard their costs. The Deputy Registrar High Court of Kenya Milimani Law Courts Civil Division is hereby requested to pay particular attention to this order and to bring it to the attention of the staff at the Civil Division Registry.

34. Once again, this court hereby advises the Applicant to get legal representation to assist him pursue his claim in the right fora and against the correct parties and in the correct cause of action.

35. It is so ordered.

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of May 2019**

**J. KAMAU**

**JUDGE**