REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 446 OF 2000

JOHANNA MBOGO & MTUMISHI CHURCH OF GODC/O RUMBA

KINUTHIA & CO. ADVOCATES.....RESPODENTS

VERSUS

JOSEPH KIMARI & OTHERS.....APPLICANTS

RULING

Before me is an application by way of Notice of Motion dated 13th July, 2015 and filed on the same day. It is under Order 22 Rule 22, Order 9 of the Civil Procedures Rules and Sections 1A, 1B and 3A of the Civil Procedure Act seeking orders that leave be granted for the firm of Gathii & Company Advocates to come onto record for the defendants, and that there be a stay of proceedings in respect of Notice to Show cause issued on 29th June, 2015 pending the hearing of the application.

The application is opposed and a replying affidavit has been filed on behalf of the decree holders. Both counsel have filed written submissions which I have on record. When the application first came before the court under certificate of urgency, on 17th July, 2015 Onyancha J declined to issue any interim stay and ordered that the hearing date be taken in the registry.

I have had time to go through the record before me and noted that this matter has been heard by the High Court before and ended up in the Court of Appeal. It has also been a subject of several applications, decisions of which have been rendered by Lenaola J, Sitati J and Okwengu J (as she then was). In the affidavit in support of the present application, the issues raised therein relate to whether or not the subject matter being land parcel No. 33716 Dandora Area Phase III exits for purposes of execution herein.

This is a matter that has been the subject of previous proceedings in this record and which has been addressed conclusively by the courts before. The Court of Appeal has had occasion to deal with this matter vide Civil Appeal No. 254 of 2002. What the judgment debtor is trying to do in this application is to re-open pleadings that have been addressed by both the High Court and the Court of Appeal and determination made thereon.

The Judgment debtor is prohibited by Section 7 of the Civil Procedure Act,Cap 21 Laws of Kenya which provides 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 the parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suits or the suit in which such issue has been**

subsequently raised, and has been heard and finally decided by such court."

The application by the judgment debtor is not a new suit, but in bringing this application the party is attempting to reverse proceedings and court orders that have settled the matter with telling finality. In the event the issues being raised now were not raised during the proceedings in the High Court and Court of Appeal, the defendants have no one to blame but themselves.

In the English case of **Henderson Vs. Henderson (1843) 67 ER 313** the court stated 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 litigation in respect of matter which might have been brought forward, as part of the contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applied, 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."** See also **Bernard Mugo Ndegwa Vs James Nderitu Githae and 2 Others (2010) eKLR**.

In the case of **E.T Vs Attorneys General & Another (2012) eKLR** the court said as follows,

> "**The courts must always be vigilant to guard 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 in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs 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 Vs 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*."**

Applying the foregoing principles to the present application, I observe that the defendants/judgment debtors had all the time and opportunity to advance and canvass the issues now raised but lost. The judgment creditors have a decree in their favour. It is their right to execute the same, and applications such as the one brought by the judgment debtors, should not be encouraged by the courts.

The only order that commends itself in the circumstances of this case, in view of the age of this litigation which must now come to rest, is that the application is dismissed with costs to the judgment creditors.

Orders accordingly

Dated, signed and delivered at Nairobi this 29th Day of June, 2016.

A. MBOGHOLI MSAGHA

JUDGE