



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 424 OF 1996

1. SAIFUDEEN ABDULLA BHAI PLAINTIFFS

2. HUSSEIN ABDULLA BHAI

- V E R S U S -

ZAINABU MWINYI DEFENDANT

RULING

1. On 2nd August 2013 the applicant herein filed a Notice of Motion accompanied by supportive affidavit of Saifudeen Abdalla Bhai seeking inter alia the following Orders;-

1. *THAT the matter be certified as urgent and service of this application be dispensed within the first instance*
2. *THAT this honourable Court be pleased to grant the Plaintiffs leave to amend the amended plaint dated 8th May , 1997*
3. *THAT the Defendant be at liberty to file and serve a re-amended Defence fourteen days after the service of the amended plain.*
4. *THAT the interim and / or temporary order of injunction be granted against the Defendant, her agents and / or servants restraining her from continuing with the construction of the extended area of the suit premises whether by way of constructing additional storeys upwards or extending the suit premises at the front or sideways , the suit premises which are situated on the portion of Plot No. 27/Section XVI/Mombasa pending the hearing and the determination of this application.*
5. *THAT the interim and / or temporary order of injunction be granted against the Defendant, her agents and / or servants restraining her from continuing with the construction of the extended area of the suit premises whether by way of constructing additional storeys upwards or extending the suit premises at the **front** or sideways , the suit premises which are situated on the portion of Plot No. 27/Section XVI/Mombasa pending the determination of this suit.*

[2] The Defendant filed Preliminary objection dated 12th August 2013 and raised two issues first that the Application is Res judicata and secondly that the application is otherwise an abuse of Court process.

[3] The parties agreed to dispose off the matter by written Submissions, Counsel for the

Defendant Mr. Khatib filed submissions dated 20th August 2013. It was his submission that the application is Res judicata as similar application was brought by the Applicants via chamber summons dated 7th August 1996. Where the applicant sought the following Orders :-

1. *THAT the matter be certified as urgent and service of this application be dispensed within the first instance*
2. *THAT a temporary injunction be issued restraining the defendant, her servants or agents otherwise howsoever from constructing an illegal structure on the plot No. 27/Section XVI /Mombasa until the hearing and final determination of this suit .*
3. *THAT a temporary injunction be issued against the defendant, her servants or agents to restrain them from remaining on or continuing in occupation of the said plot and building thereon.*

[4] He further submitted that the issues arising out of the application dated 2nd August 2013 and the issues arising in the application dated 7th August 1996 are directly similar. And he relied on the case of **KANORERO RIVER FARM LIMITED & 3 OTHERS -VS- NATIONAL BANK OF KENYA LIMITED** . It was his submission that the temporary injunction was in force for a period of 14 years up to December 2011. when the Order lapsed with operation of Law as held in the ruling dated 26th July 2013. And that the applicant has now approached this Court with a similar application seeking the same orders. This he believed was an abused of Court process.

[5] Mr. Anyanzwa Advocate for the Plaintiffs filed his written submission where he submitted on both his application dated 2nd August 2013 and also on the issues raised on Preliminary Objection particularly as to whether the prayers for interim injunction is Res Judicata. He invited the Court to look at Paragraph 14 to 17 of the supportive affidavit of Saifudeen Abdulla Bhai and asserted that what is being put up is a new construction, with new foundation slabs, new pillars, new slabs for first floor, construction of the first floor, and by the time the interim injunction was granted, there are protruding iron bars showing that the Defendant intends to continue upwards.

[6] Mr. Anyanzwa further submitted that the construction of this new extended building has not been subject of an application in this Court and that this is a completely new construction and cannot be said to be based on similar facts as previous application. He relied on the case of **ANAJ WAREHOUSING LTD VS NATIONAL BANK OF KENYA and REGISTRAR OF TITLES (2006) e KLR**

[7] The ingredients of Res Judicata is well inscribed in Section 7 of the Civil Procedure Act 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 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.”

That Section prohibits a party reopening a subject matter that had been the subject of a previous determination. This was well stated in the case **HENDERSON -VS- HENDERSON (1843-60) ALL E.R. 378** in that case the Court stated-

“... where a given matter becomes the subject of litigation in, and of 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 a matter which might have been brought forward as part of the subject in 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 applies, except in special case, 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.”

8 The Court of Appeal in the case **MBURU KINYUA -VS- GACHINI TUTI** **[1976- 80]IKLR 790** had this to say in respect of an application that had been filed-

“That the second application was res judicata since the facts on which it was based were known to the Appellant at the time when he made the first application. This decision was furthering the provisions of Section 7 as reproduced above. That Section requires a party to bring before a Court its whole case. A party is not permitted to bring before Court his case in piece meal.

9.. The Court of Appeal in the case **UHURU HIGHWAY DEVELOPMENT LTD -VS- CENTRAL BANK OF KENYA & 2 OTHERS CIVIL APPEAL NO. 36 OF 1996** added its voice on this issue by stating-

“What is before us is: can a matter of interlocutory nature decided in one suit be subject of another similar application in the same suit? Does the principle of res judicata apply to an application heard and determined in the same suit?

... There is no doubt at all that provisions of Section 7 of our Civil Procedure Act relating to res judicata in regard to suits do apply to applications for execution of decrees but there is no doubt, also, that these provisions are governed by principles analogous to those of res judicata.

...There is not one case cited to show that an application in a suit once decided by courts of competent jurisdictions can be filed once again for a 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 similar nature; that is to say further, wider principles of res judicata apply to applications with 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.”

10. In the present case, it is not disputed that the parties in the previous application are the same parties in the present application. Secondly its not disputed that the Courts that heard the previous application was a Court of competent jurisdiction. The Only issue left to for this Court to determine is whether the further prayers sought in this application amounted to fresh matters not adjudicated upon by **Ang'awa J.** in her Ruling delivered on 13th March 1997. Counsel for the Plaintiff urged the Court to look at paragraphs 14 and 17 those paragraphs stated as follows:

“ 14. Since 2nd June 2013 the Defendant set to extend and expand the suit premises by laying fresh foundation for the extension and expansion of the suit premises far extending the boundaries previously occupied by the house without land of wattle and daub, corrugated iron sheet , mud ceiling on boriti poles . I annex herewith copies of photographs taken on 2nd June ,2013 showing the previous premises, the foundation extensions and expansion marked “SAB 5”

annexe showing pillars and “SAB 6”

15. THAT the constructions have continued despite our protests. I herewith copies of photographs dated 11th June ,2013 the foundations to the new extensions built and the shattering for the first floor slab in place marked

16. THAT the Defendant has continued with the construction and has completed the first floor and is now poised to build further storeys upwards. I annex herewith copies of photographs dating

from 23rd July 2013 marked " SAB 7"

17. *THAT it is absolutely necessary the order for injunction should be granted otherwise the Defendant has clearly shown her desire to grab and acquire more of our land as she expands and extends constructing beyond and above what area initially covered by the house without land built of wattle and daub with corrugated iron sheets roof and ceiling of mud on boriti poles. "* original

Having perused the affidavit above quoted, I note that the defendant herein did not file any response. I have no doubt that new matters have emerged. They are different from the matters dealt with by Angawa J. This point is well canvassed in the case of **Mburu Kinyua vs Gachiri Tuli [1976] 80 KLR 790** above quoted. This matter is of 1996. It should be fixed on priority basis for hearing and final determination.

This application is dismissed with costs.

Dated and delivered in open Court in Mombasa this 21st day of February, 2014.

S.N. MUKUNYA

JUDGE

21.2.2014

Mr. Anyanzwa for the respondent

Mr. Khatib Advocate for defendant