



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 519 OF 2011**

**PETER GICHORA MWAURA ..... 1<sup>ST</sup> PLAINTIFF**

**PAUL KUNGU KAMATA ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JOSEPH WERU NDUNGO ..... 1<sup>ST</sup> DEFENDANT**

**HOUSING FINANCE COMPANY OF KENYA LTD. .... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. The first Defendant's Notice of Motion dated 27 June, 2012 requests of this court that the suit herein be dismissed on grounds of duplicity. The grounds detailed in that regard are as follows:

**“a) That the Plaintiff’s instituted Nairobi HCCC No. 163 of 2007 against the Defendants seeking general and special damages for unlawful eviction and lost items.**

**b) That the issue raised in Nairobi HCCC 519 of 2011 and Nairobi HCCC No. 163 of 2007 and the subject matter therein as well as the parties are similar.**

**c) That HCCC No. 163 of 2007 was heard and determined on 20<sup>th</sup> December 2011.**

**d) That the issue raised by the Plaintiffs Nairobi HCCC No. 519 of 2011 are therefore Res-judicata as the same have already been conclusively determined in Nairobi HCCC No. 163 of 2007”.**

The Application was supported by the brief Affidavit of Joseph Weru Ndungo dated 27 June, 2012 and who is the first Defendant herein. In the said Affidavit, the deponent records that there was another similar suit filed by the Plaintiff herein and being *HCCC No. 163 of 2007*. In that suit, the deponent said that he had been jointly sued with the second Defendant herein for recovery of general and special damages for unlawful eviction. He noted that the suit had proceeded to full hearing and judgement was delivered on 20 December, 2011 in favour of the Defendants therein. Rather than lodging any appeal thereto, the First Plaintiff in this suit being the Plaintiff in the former suit, together with the second Plaintiff herein, filed this suit only 21 November, 2011, before the judgement in the previous suit had been delivered. In the deponent's opinion this suit is fatally defective as the same is *res judicata*.

2. The Plaintiff's herein through the second Plaintiff, Paul Kungu Kamata, filed a Replying Affidavit on 23 July, 2012. The first thing that the second Plaintiff detailed was that he was not a party as per the Amended Plaintiff filed in *HCCC No. 163 of 2007* to that suit. The deponent stated that he had read the Amended Plaintiff in that suit and noted that the cause of action therein was limited to the plaintiff challenging the second defendant's power of sale over the suit property L. R. No 14225/122, as chargee. The Plaintiff therein had also challenged the legality of the sale of the suit property to the first Defendant herein. The second Plaintiff indicated that as far as this suit was concerned, it was grounded as a result of the actions of the first Defendant on 21 November, 2008 in which he unlawfully evicted the first Plaintiff from the suit property, demolished his house, caused lasting damage and destruction of his household goods as well as those goods which the second Plaintiff had kept in the first Plaintiff's house. The second Plaintiff noted that the first Defendant herein had repeatedly filed applications in the former suit, seeking the eviction from the suit premises of the first Plaintiff, which applications were all declined by the court. The second Plaintiff summarised his Affidavit in stating that the current suit is seeking damages for unlawful eviction, as well as damages for the said household goods and for the demolition of the house.
3. In reply, the first Defendant filed a Further Affidavit on 18 September, 2012. He immediately denied the second Plaintiff's assertions that the issues raised in the two suits were dissimilar. Further, he categorically denied ever unlawfully evicting the first Plaintiff from the suit property or demolishing his house or causing loss and damage to his household goods or indeed, those of the second Plaintiff. The first Defendant noted that that the judgement of Justice Kimondo in the former suit *HCCC No. 163 of 2007*, had found that the sale and transfer of the suit property to the first Defendant was legal and further, the Judge upheld the eviction order against the Plaintiffs. The deponent stated that it was only after that judgement was delivered that he took possession of the suit premises. The first Defendant reiterated his Affidavit in support of the Application before court in which he stated that he had been informed by his advocates on record that the issues raised by the Plaintiffs in this suit are *res judicata*.
4. Counsel for the parties made their submissions orally before me on 19 September 2012. Mrs. Macharia for the first Defendant detailed to the court that her client's Application was brought under the provisions of **Order 2 rule 15 (1) (a)**, as well as **sections 3A and 7** of the *Civil Procedure Act*. She admitted that in a nutshell, there was a previous suit filed being *HCCC No. 163 of 2007*. She noted that by the time this suit was filed, the other suit had not been determined but that judgement therein was delivered at by Mr. Justice Kimondo on 20 December, 2011. She observed that the Plaintiffs herein had conveniently not disclosed to the court in the earlier suit, the existence of this suit. The first Defendant regarded such as mischief on the part of the Plaintiffs who had the option of consolidating the 2 suits so that the matter could have been disposed of once and for all. Counsel noted that under **Order 1 rule 1**, the second Plaintiff herein, who was not a party to the former suit, could have been enjoined thereto. She said that notwithstanding, the issues that have been raised in this case are precisely the same issues as were raised in the previous case. In the former suit, there were no particulars of damages and if those were subsequent to the judgement thereto, the same could still have been cured by amendment.
5. Mrs. Macharia continuing her submissions urged me to call for the court file for *HCCC No. 163 of 2007* when considering this Ruling. She stated that I would note therefrom a whole series of application made by the Plaintiff therein. The issues that are being raised in this suit concerning unlawful eviction were canvassed and determined. The same is *res judicata* as during the trial of the previous suit, the first Plaintiff had tried to introduce evidence on the issue of possession of the suit premises and also the issue of unlawful eviction. In the other suit, there had been a prayer in the Counterclaim for an order for eviction and the court has granted that order. Further, the only remedy that the first Plaintiff had in the previous suit was in damages. However, he had opted out of seeking damages in that suit and the court found that it could not avail such damages. A determination had already been made on that point. Mrs. Macharia submitted that **section 7** of the *Civil Procedure Act* is very clear, more precisely Explanation no. 4 of that section. She also asked me to look at the first Plaintiff's documents in the former suit, particularly the first Plaintiff's letters of 11 March, 2011 and 29 January, 2011. Counsel went on to say that the cause of the action allegedly arose on 23 November, 2008 and she queried why now a demand was being made in 2011. Finally, counsel submitted that the Plaintiffs seem to be putting their house in order by back-dating letters for the purposes of this suit.

6. In reply, Mr. Kamata stated that he relied upon the Replying Affidavit of the second Plaintiff, as well as the Grounds of Opposition filed on 23 July, 2012. Those had simply detailed that there was no duplicity at all between the current suit and *HCCC No. 163 of 2007* as the parties, the causes of action and the dates of the said actions, are very different. The Plaintiffs considered that the first Defendant's Application had no merit whatsoever and was a waste of this court's precious time. Mr. Kamata detailed that in the former suit, the first Plaintiff was contesting the sale of his land to the first Defendant herein and therein. That parcel of land had been purchased by the first Defendant from the second Defendant through a public auction. It was while that suit was in the process of being heard, that the first Defendant considered that he was the one to have possession of the suit premises. He had made numerous applications in the former case seeking vacant possession from the first Plaintiff, but the same were not granted. He also made another application maintaining that the first Plaintiff ought to have been paying rent. That application was also disallowed. Consequently, after losing those applications, the first Defendant forcibly evicted the first Plaintiff and his family by hiring armed thugs on 21 November, 2008. During the eviction, the thugs damaged the first Plaintiff's property, which was not the subject of the previous suit. Some of the property was stolen. Others were damaged and some of the property belonged to the second Plaintiff. Counsel maintained that this suit is in relation to the damaged and stolen goods not about possession of the suit property. Counsel then went on to say that indeed the first Plaintiff had made a number of applications to court in his efforts to get back possession of the suit premises. He did not get back such possession when the former suit went against him. There had been no mention in Mr. Justice Kimondo's judgement in that case. As regards the actions of the first Defendant in demolishing and destroying the Plaintiffs' goods, counsel further noted that this case was filed before the judgement in the former suit, and there was no way that the Plaintiffs can be forced to go back to the other suit.
7. In summing up his submissions, Mr. Kamata detailed to this court that the causes of action and the prayers in both suits were very different and the second Plaintiff was not a party to the former suit. The first Plaintiff is not asking for any prayers that he sought in the former suit sufficient to make the matter *res judicata*. In the former suit, there were no prayers as regards the first Plaintiff's eviction or damage to his property. There was no mention of the claim being time-barred nor that this court has no jurisdiction to hear this suit. Counsel submitted that the Plaintiff's should be left alone to proceed with this current suit. He noted that witness statements had been filed sufficient to counteract the Affidavit in support of the Application.
8. In a brief reply, Mrs. Macharia submitted that on the issue of possession the court should look at page 3 of Mr. Justice Kimondo's Judgement where the same was touched upon. Even the interlocutory application is concerned and had involved the question of possession. The Defendants had sought full vacant possession and also payment of rent. That issue had been addressed in the previous suit. Counsel repeated her request that the file in respect of *HCCC No. 163 of 2007* be produced before this court and inspected so that the court may be enlightened upon all that had transpired in that suit.
9. I was a little surprised that neither counsel produced any authorities for this court's consideration with regard to the Application before it. The law as regards *res judicata* cases is now well settled, the leading case being **Pop-in (Kenya) Ltd & 3 others vs Habib Bank AG Zürich (1990) KLR 609**, is the milestone decision. In that case the Court held *inter-alia*:

**"... The plea of *res judicata* applies not only to points which the court was actually required by the parties to form an opinion and pronounce judgement, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have been brought forward at the time."**

Further with regard to the matter being *res judicata*, section 7 of the **Civil Procedure Act** provides that:

**"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."**

Explanation (4) of that section further provides that:

**"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."**

From the above, it is clear that the court will not deliberate on a matter that has been directly and substantially in issue in a previous suit. Further, a matter that the party to the suit ought to have, by reasonable diligence, raised in the former suit, will be deemed as determined by the court in that suit.

10. I have also gleaned some assistance from 3 English cases as follows. Firstly the case of **Director of Public Prosecutions v Humphrys (1976) 2 All ER 497** in which the court referred to the decision of **Lord Diplock** in **Mills vs Cooper (1967) 2 All ER 100 at P. 103** who had this to say:

**"... a party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or the legal consequence of fact, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings, has since become available to him."**

In **Mills vs Cooper**, the issue for determination by the court was whether the matter in a case had been concluded in a previous suit brought on similar facts. It was held that the issue had been heard and determined in a previous suit and the prosecution was barred from re-opening the question and hearing the case the new. **Lord Diplock**, in rendering his decision, referred to the case of **Haystead vs Taxation Commissioner (1925) All ER 56**, wherein he observed:

**"... the issue estoppel results in there being no issue in the subsequent civil proceedings to which such evidence would be relevant. Issue estoppel is a particular application of the general rule of public policy that there should be finality in litigation."**

Further, in **Mcllkenny vs Chief Constable (1980) 2 All ER 229**, **Lord Loreburn** struck out the action by saying:

**"The issue had already been finally determined against them by a court of competent jurisdiction in the criminal proceedings to which they were parties, and in those proceedings they had a full and fair opportunity of presenting their case, and in all the circumstances it would not be just to allow them to re-open the issue... In any event it would be an abuse of process to all the Plaintiffs to litigate again the identical issue to that which had already been decided against them in the criminal proceedings, and they would not be permitted to call the further evidence on which they sought to rely..."**

Bearing the above in mind, it seems that the litigation can only be reopened if the Plaintiff can show that the judgement was obtained by fraud or collusion or that there is new evidence that could not have been, by reasonable diligence, adduced at the hearing of the previous suit. It would not only be an abuse of the process but also unfair and unjust and against the principle that litigation has to come to an end.

11. I have carefully checked the exhibits "JWN 1 & 2" attached to the Affidavit in support of the Application. It is apparent to me that the contents of the Amended Plaintiff in *HCCC No. 163 of 2007*, more particularly its prayers, are entirely different from the Plaintiff filed herein on 21<sup>st</sup>

November 2011. In the earlier suit, the 1<sup>st</sup> Plaintiff herein was the Plaintiff in that suit and the Defendants herein the Defendants. The only difference between the two suits in terms of parties, is the addition, in this suit, of the 2<sup>nd</sup> Plaintiff Paul Kungu Kamata. In *HCCC No. 163 of 2007*, the Plaintiff therein was seeking to set aside the sale of the suit property L. R. No. 14225/122, Kahawa West, Nairobi by the 2<sup>nd</sup> Defendant therein to the First Defendant. My learned brother Kimondo J. dealt with that aspect in his Judgement delivered on 20<sup>th</sup> December 2011, when he dismissed the Plaintiff's suit thus upholding the sale of the suit property to the 1<sup>st</sup> Defendant.

12. What this suit is all about and if the Plaintiffs' allegations are correct, this Court will find the actions of the 1<sup>st</sup> Defendant herein particularly irksome, is the latter's actions before the Judgement was delivered in *HCCC No. 163 of 2007*. According to the Plaintiffs herein, on 21<sup>st</sup> November 2011 while the Judgement in *HCCC No. 163 of 2007* was still pending, the 1<sup>st</sup> Defendant hired a gang of armed thugs to force entry to the suit premises, evicting the Plaintiffs herein therefrom and causing a considerable amount of damage to and loss of the Plaintiffs' goods therein. To my mind, that is a totally different cause of action from that sought and pursued in *HCCC No. 163 of 2007*. Further, I have perused the Defences of both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein which, incidentally, were filed in Court 6 and 7 weeks respectively after the Judgement in *HCCC No. 163 of 2007* had been delivered. Not surprisingly both Defendants make the statement therein that this Court had already found in favour of the Defendants as regards the ownership and entitlement to possession of the suit property. Similarly, both Defences as regards the allegations of malice, loss and damage in the Plaintiffs' herein, amount to a general denial of the same. Accordingly, I believe that the Plaintiffs have every good reason to continue to prosecute this case as against the Defendants and I dismiss the 1<sup>st</sup> Defendant's Notice of Motion dated 27 June 2012 with costs to the Plaintiffs.

**DATED and delivered at Nairobi this 12<sup>th</sup> day of February 2013.**

**J. B. HAVELOCK**

**JUDGE**