



No. 118/2013

IN THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. 141 OF 2009

DAMISHA BUILDING CONTRACTORS..... APPLICANT

VERSUS

AUTO SPRING MANUFACTURES LTD.....RESPONDENT

RULING

1. On the 10th October, 2012, the defendant filed a Notice of Preliminary Objection on a point of law as follows:-
 - i. **That** the matter is *res judicata* by virtue of Section 7 of the Civil Procedure Act in view of the order issued on the 18th July, 2005 by **Osiemo, J**
 - a. The suit was determined in its entirety when the defence and counterclaim were struck out on 18th July, 2005.
 - b. The issue of costs under Section 27 of the Civil Procedure Act has been determined and settled.
 - c. The order dated 5th October, is a decree as defined under Section 2 of the Civil Procedure Act.
 - d. The order issued on 5th October, 2005, did not preserve any prayer in the plaint dated 25th January, 2005.
 - e. The Bill of Costs filed pursuant to the order was taxed and a Certificate of Costs issued as was paid to the plaintiff in full.
 - ii. The defendant having paid the taxed costs of the entire suit, there is no provision in law for the suit to be heard on any other issues.
 - iii. Once the order of 18th July, 2012 was issued the entire suit comprised in the plaint dated 25th January, 2005 was compromised and/or determined.
 - iv. In the circumstances, the application seeking exemplary damages, special damages and/or compensation for loss of user is an abuse of court process and the matter ought to be struck out.
2. The plaintiff opted to file grounds of opposition in response thereto whereby he stated that:
 - i. The Preliminary Objection raised is misconceived, based on facts that are not true as the suit is not *res judicata*.
 - ii. The defendant's defence having been struck out, an interlocutory judgment was entered against the defendant on the 21/11/2008 and an order made that a date be taken for formal proof on

- assessment of damages.
- iii. Since 2008 the case has never proceeded to formal proof following adjournments sought by the defendant.
 - iv. Costs awarded if any were for an application for an injunction that was allowed but did not extend to the main suit.
3. Counsels for parties herein agreed to canvass the application by way of written submissions which I have duly considered.
 4. Looking at the background of the suit, the Plaintiff/Respondent sued the defendant/applicant in Civil Suit Number 79 of 2005 at Nairobi High Court. On perusal of this file, however, I failed to trace the plaint. The defendant did file s Statement of Defence and Counterclaim dated 25th February, 2005. The plaintiff's response to the defence and counterclaim were filed on the 4th March, 2005.
 5. From the record it is apparent that the dispute arises from ownership of parcel of land, title Mavoko Municipality/Block/6/789 hereinafter the "suit premises" summarized prayers sought by the plaintiff against the defendant in the plaint as follows:-

“(a) an order that it forthwith remove its illegal fence from and vacate L.N. No. Mavoko Municipality/Block 6 789 and in default be evicted therefrom.

b) An injunction restraining the defendant whether by itself its servants or agents from entering into, remaining on, fencing or otherwise interfering with the suit premises.

c) Damages for trespass and loss of user

d) Costs of the suit.

6. Having considered the application entirely the court dismissed the defence filed and allowed prayers sought in the application. Consequently the defendant was ordered to vacate the suit premises or be evicted there from and the plaintiff was awarded costs of the application and the entire suit.
7. On the 17th February, 2006 the plaintiff filed its Bill of Costs. On the 5th July, 2006 parties recorded a consent before the Deputy Registrar in respect of the Bill of Costs against the defendant. The consent was recorded in the following terms –

“By consent of the plaintiff's bill of costs against the defendant dated 16th February, 2006 be and is hereby taxed and allowed in the sum of Kshs. 96,195/= all inclusive”.

The consent was duly signed by **Mr. Meenye** for the plaintiff and **Mr. Gitonga** for the defendant.

8. On the 21st November, 2008 an interlocutory judgment was entered against the defendant by a Senior Deputy Registrar. The matter came up on the 27th November 2008 before **Osiemo, J.** Counsel for the plaintiff notified the court that it was an old matter. The defence had been struck out. The matter was for formal proof on assessment of damages. The court directed that a date be taken at the registry on priority basis. On the 5th May, 2009, **Osemo, J** noted that the subject matter was land. He therefore made an order transferring the case to Machakos High Court for determination. At Machakos Law Courts the case was assigned the Number HCC 141 of 2009.
9. This therefore brings in the issue whether the matter herein is *res judicata*?
10. Section 7 of the Civil Procedure Act provides:-

“No court shall try any suit or issue in which the matter directly or substantially in issue has been directly or substantially in issue in a former suit

between the same parties... and has been heard and finally decided by such court.”

11. From the background of the facts analyzed herein above it is apparent that HCCC No. 79 of 2005(Nairobi) was transferred to Machakos pursuant to the provisions of Section 18 of the Civil Procedure Act where after it was assigned No. 141/2009 (Machakos). Parties in the suit remain the same. There is neither a former suit nor subsequent one because it is the same suit. The doctrine of *res judicata* would therefore not apply.
12. The arguments raised by the applicant have been prompted by the ruling of the court that the defence and counterclaim were struck out; the defendant to vacate the suit premises and to pay the plaintiff the costs of the application and the entire suit. Such an order should be viewed to be a final determination of a suit. It has been submitted by counsel for the applicant following the ruling it was evident that the court had considered all issues raised by the suit consecutively and made a final determination. The ruling in his opinion did not preserve any prayers in the suit.
13. According to what has been stated in the ruling as having been prayed for the plaintiff having granted prayer 1 of the application was tantamount to granting prayer ‘a’ in the plaint. Prayer ‘b’ was also technically granted. Prayer ‘d’ which was for costs of the suit was granted. What was therefore not granted was prayer ‘c’ for damages for trespass and loss of user. It can therefore not be authoritatively asserted that all issues raised in the suit were conclusively determined. Whether or not the omission was deliberate is an issue this court cannot answer as it was not expressly stated by the court.
14. It is important to note that after parties entered into a consent following the ruling of the court and costs were assessed in the year 2006; a certificate thereof was made by the Deputy Registrar.
15. Later on, an interlocutory judgment was entered by the Deputy Registrar in the year 2008. This was following an application by the plaintiff. The court set various dates for hearing of the formal proof. Eventually the plaintiff’s witness testified on the 10th November, 2011. The plaintiff then closed its case. Following another application made by the defendant’s counsel the proceedings were set aside.
16. An interlocutory Judgment was entered against the defendant by the court because there was a claim for damages for trespass and loss of user which remains undetermined. It is for this reason that the matter has been pending formal proof.
17. The defendant/applicant had an option to apply to set aside the interlocutory judgment entered but this was not done. The interlocutory Judgment having been entered by the court cannot be overlooked. Striking it out would be tantamount to usurping powers of an appellate court. The order therefore subsists. It is also important to note that a decree may be final or partial. In this case it is evident that following the order made on 5th October, 2005, which did not address prayer ‘C’ in the plaint, further proceedings had to be taken for the purposes of completely disposing of the suit. Therefore the decree herein which was preliminary cannot be viewed to have been final. In any case there is no decree drawn on record.
18. From the foregoing it is apparent that the preliminary objection raised lacks merit. Accordingly, it is dismissed.
19. Each party shall bear their own costs.
20. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of OCTOBER, 2013.

L.N. MUTENDE

JUDGE