REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 201 OF 2009

1. **MOMBASA MOTOR VEHICLES SALES LTD**
2. **ROSHANZAMEER ALI MOHAMED KASMANI**
3. **MUSHTAQ AHMED ALI MOHAMED KASMANI**
4. **KULSUMBHAI & ALI MOHAMED ESSA CHARITABLE TRUST**
5. **SALIM SHAMSHUDEEN ESSA KASMANI**
6. **SHAMSHUDEEN ESSA KASMANI …………………… PLAINTIFFS**

-V E R S U S-

JANE KAVITI NZIOKA ………………………..…………. DEFENDANT

RULING

1. The Plaintiffs by their plaint seek orders against the Defendant for-

a. ***Vacant possession of title Mombasa/Block XIX/125.***

b. ***Mesne profit from 1st June 2007 until vacant possession at***

Kshs. 44,322/- per month.

(c) For monies deposited by the Defendant in previous suits to be

released to the Plaintiffs.

d. ***That any decree for vacant possession and mesne profit be***

executed before taxation.

2. The Plaintiffs have filed a Notice of Motion dated 27th August 2012. By that application they seek for an order that the Defendant do deposit in the client's account of Kasmani & Co. Advocates the sum of Kshs. 3,113,568/- or such sum as the Court will deem proper. The Plaintiffs sought that such a sum be held by the said Advocate in trust for the parties until further orders of the Court. The Plaintiffs also sought that in default of the Defendant providing such sum the Court do order that the Defendant give vacant possession or that the Plaintiffs be at liberty to evict her forthwith.

3. That application is brought under Order 13 Rule 2 of the Civil Procedure Rules 2010. That Rule provide as follows-

"Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such application make such order, or give such judgment, as the Court may think just."

4. The jurisprudence relating to applications made for judgment on admission is set out in the following cases **CHOITRAM -V- NAZARI (1984)KLR 327**-

"For the purpose of Order XII Rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning."

CASSAM -V- SACHANIA [1982] KLR 191-

"The judge's discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the Plaintiff to judgment."

5. The Plaintiffs in their affidavits allege that the Defendant is in possession of the premises albeit as a trespasser. That she had admitted that she was in possession in her affidavits and her defence. Further the Plaintiffs alleged that the Defendant had not paid rent to the Plaintiffs from June 2007 todate. They therefore sought that the Court do order the Defendant to pay to their Advocates Kshs. 3,113,568/- being rent arrears for upto July 2012.

6. To perhaps capture the Plaintiffs' sentiments I will reproduce some of their Advocate's submissions as follows-

"The Defendant has been occupying the landlords premises, and the landlord continues to suffer every day. It is unjust and unconscionable to allow the occupant who purports to be a tenant to occupy the premises rent free until trial. Let them pay rent whilst in occupation."

7. The Defendant inturn submitted that the Plaintiffs' application is based on alleged facts. That the allegation of the Defendant being a tenant was not clear and obvious to entitle the entry of judgment on admission. Secondly the Defendant submitted that the present application is res judicata the Court having dismissed the Plaintiffs application dated 13th July 2009. That dismissed application sought the entry of summary judgment in favour of the Plaintiff.

8. I believe the strongest opposition that the Defendant has to the Plaintiffs present application is that the application offends the doctrine of res judicata. Section 7 of the Civil Procedure Act Cap 21 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."

9. In the case **Mbeu Kithakwa -Vs- Philip Muchiri Mugo Civil Case No. 87 of 2007** the Court considered that doctrine and stated as follows-

"***However, much more than that, it should by now be clear that the plaintiff in filing this***

case replicated the lower court's case. Section 7 of the Civil Procedure Act forbids the court from entertaining an action in which the matter directly or substantially had been directly and substantially in issue in a former action which has been heard and finally determined by a competent court. The doctrine of res judicata related to a matter adjudicated upon or a matter upon which a judgment has been pronounced. The plaintiff in opposing the defendant's argument that the application is caught by that doctrine was heard to say that since the High Court in its judgment in the appeal of the lower court case found that the lower court suit was incompetence for having been initiated by way of miscellaneous application, that the plaintiff was entitled to file this fresh action. Such an argument goes contrary to the practice of law and public policy, that is, there must be finality of litigation. The question whether or not the decision in the previous action was right or erroneous has no bearing on whether it operates as res judicata or not. The converse would take legal practice to a ridiculous heights because every decision would be impugned as erroneous and there would be no finality of cases. The doctrine of res judicata contains the rule of conclusiveness of judgment based on maxim or Roma jurisprudence "interest reipublicae ut sif finis litium" (that is, it concerns the state that there be an end to law suits). See Mulla The Code of Civil Procedure 16th edition."

10. Plaintiffs' summary judgement application which was dismissed

sought the order for vacant possession and mesne profits. The Court by its Ruling of 3rd July 2012 dismissed that application. The Plaintiffs by their present application seek for the Defendant to deposit Kshs. 3,113,568/- being rent arrears of the period from June 2007 to July 2012. In other words the Plaintiffs seek for an order of mesne profits. The Plaintiffs also by the present application seek for an order of vacant possession if the Defendant defaults in making payment for the rent arrears. Those two prayers are essentially the prayers the Plaintiffs had sought by their application for summary judgment. Indeed they are the prayers in the plaint.

11. It therefore follows that to entertain the Plaintiffs present application

would be contrary to the provisions of Section 7 of Cap 21 and would therefore run foul to the doctrine of res judicata. It is on that basis that the Plaintiffs application fails.

12. From the two applications that the Plaintiffs have filed in this matter

one indeed get the feeling of the frustration of the Plaintiffs in wanting to conclude this matter. It is for that reason that at the reading of this Ruling a hearing date will be given for this case.

13. The Court grants the following orders-

a) The Notice of Motion dated 27th August 2012 is dismissed with costs to the Defendant.

b) The Court shall at the reading of this Ruling fix this case for full hearing.

Dated and delivered at Mombasa this 17th day of October, 2013.

MARY KASANGO

JUDGE