



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL SUIT 266 OF 2009

1. ALFRED NDERITU.....1ST PLAINTIFF
 2. FAITH WANJERI2ND PLAINTIFF

VERSUS

1. WILSON WIATHAKA GITAU.....1ST DEFENDANT
 2. NANCY WAMBUI KASINGA.....2ND DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 29th February, 2012 filed under Section 1A, I and 3 and 3A of the Civil Procedure Act. The essential orders brought by the 1st Plaintiff are as follows:

“1.....

2. *The 2nd Defendant be ordered to be in Court attendance throughout the Court proceedings before a judge.*

3. *That the 2nd Defendant be committed to civil jail for continued disobedience of Court Orders.*

4. *That the 1st Plaintiff be permitted to take possession of the suit premises with assistance of the Court Bailiff.....”*

2. The application is stated to be grounded on the fact that “**the 2nd Defendant has not complied with Court Orders.**” The application is supported by the affidavit of the 1st Plaintiff, Alfred Nderitu, in which he has deponed *inter alia*:

“1.....

2. *That I am aware that the Court delivered a Ruling in the present matter on 06th October, 2011 whereto the Defendant/Respondent were required to comply with previous orders by purging the contempt which I verily believe was to reinstate me as a tenant and hence maintain the status quo before the unlawful acts on the part of the Defendants. I produce hereto at pages 1-3 of the bundle of exhibits a letter dated 15th October, 2011, a Notice of Appeal lodged on 24th October, 2011 and a letter dated 28th October, 2011 requesting for proceedings.*

3. That I aver that it is in the interest of justice for the Court and explain why the 2nd Defendant should not be committed to jail for continuance non compliance of Court Orders. True copies of the Court Orders of 05th August, 2009 and 06th October, 2011 are annexed hereto at pages 4-5 of the bundle of exhibit.

4. That the action of the 2nd Respondent is an affront to the administration of justice which should not be condoned in a democratic environment.”

3. The Plaintiff/Respondents filed a Preliminary Objection to the motion on 23rd April 2012, raising the following grounds:

“1. The application is misconceived, bad in law and it is an abuse of the court record (sic)

2. The application dated 29th February, 2012 is res judicata subjudice.

3. The application is meant to deny the Applicants right to appeal against the Ruling delivered by this honourable Court.”

4. The Preliminary Objection was heard on 23rd April, 2012. Mr. Mkan for the 1st Defendant argued that the motion is misconceived and an abuse of the Court process because there was another application like it dated 7th August, 2009, and a Ruling issued on it on 6th October, 2011 by Honourable Lady Justice M. Odero.

The said Ruling found the Respondent in contempt of Court and fined him Kshs. 100,000/=. The 1st Defendant was dissatisfied with that order and filed a Notice of Appeal and sought certified copies of proceedings. Counsel argued that since the application for contempt had already been disposed of, the court should not sit on appeal on its own Ruling, and the present application should therefore be dismissed.

5. Mr. Mogaka for the Applicant argued that the Preliminary Objection is misconceived. He pointed out that the Court’s duty is the uphold the dignity of the Court, and it should not be helpless.

Counsel pointed out that prayer 3 of the application concerns a **continued** disobedience of the Court order. In the Court’s Ruling of 6th October, 2011 at Page 10, in the last sentence, the court stated that until the contempt is, fully purged by adherence to the Court’s orders of 5th August, 2009, the court would not consider or rule on the Defendant’s application of 10th August, 2009.

Counsel argued that no evidence of compliance with the Court’s orders had been demonstrated.

6. In addition, counsel argued that every advocate as a Court officer is under duty to ensure obeisance to Court orders. The appeal filed by the Defendant did seek or obtain a stay of the Courts extant orders, and a mere notice of appeal cannot amount to a stay.

7. I have considered the application, and supporting documents, the parties’ submissions to the Preliminary Objection and the previous orders of the court. For a matter to be considered as *res judicata* four conditions must exist: See **Abuk James Odera Vs John Patrick Machira** Civil Application Nairobi 49 of 2001. The four conditions are:

(a) a previous suit must exist in which the specific matter was in issue.

(b) the parties were the same or litigating under the same title.

(c) a competent court heard and determined the matter in issue.

(d) the issue has been raised once again in a fresh suit in the same case. It was held that res judicata applied to applications just as it applies to suits because there must be an end to litigation.

8. A good description of *res judicata* is contained in Black's Law Dictionary as follows:

"[for res judicata] to be applicable, requires identity in[the] thing sued for as well as identity in cause of action, of persons and parties to action, and of quality in persons for or against whom the claim is made. The sum and substance of the whole rule is that a matter once judicially decided is finally decided."

9. In this case, the motion seeks that:

- *The defendant be in court attendance throughout court proceedings before a judge (prayer 2)*
- *The Defendant be committed to jail for **continued** disobedience of Court orders (prayer 3) and*
- *The 1st Plaintiff be permitted to take possession of the premises with assistance of the Court Bailiff, (prayer 3).*

I have perused the earlier application of 7th August, 2009 which is asserted by the Defendants to be similar to the present one, and to have been determined. That application sought, essentially.

"2. That the Defendants [named] be committed to Shimo La Tewa Prison for a period of six (6) months for contempt of court orders issued herein on 5th August, 2009.

3. That Plaintiffs be granted liberty to pull down the fence obstructing their two shops premises situate at the premises on Plot Number 279/XXI/MI along Moi Avenue...."

10. The Ruling of Lady Justice Odero dated 6th October, 2011 dealt with both an application dated 5th August 2009, **and** the application dated 7th August 2009 which is the subject of the Preliminary Objection asserted herein. In her Ruling, Justice Odero noted that she had issued interim orders on 5th August 2009 (in relation to the motion of that date) which had not been complied with, hence the application by the Plaintiffs on 7th August 2009 seeking orders for contempt. She also found the orders of 5th August, 2009 had not been complied with and held at Page 9-10 of her Ruling as follows:

"The courts of 5th August, 2009 contained a penalty clause. These orders were served personally on the 2nd Defendant who received personal notice of the court orders and remains in flagrant disregard of the same is in contempt of court orders.... She will pay a fine of Kshs. 100,000/- in default will serve three (3) months in civil jail."

11. As earlier noted, the present application seeks that the Defendant be committed to jail for **continued disobedience** of Court orders. I understand this to mean, and it was so argued by the counsel for the Plaintiff, that the Court orders made in the Ruling of Justice Odero dated 6th October, 2011, have **continued** to be disobeyed, and the court must therefore take the actions sought in the prayers in the present motion.

To my mind, the present motion, and the motion of 7th August, 2009 are worlds apart in terms of the subject matter they deal with. The present motion seeks a remedy in respect of court orders of the court's Ruling of 6th October, 2011, whilst the motion of 7th August, 2009 sought a remedy in respect of the court's orders of 5th August, 2009.

Although the parties are the same, there is no identity in cause of action. Accordingly, the rule of subjudice is not applicable in the circumstances, and the Preliminary Objection fails.

12. The upshot of my findings above is that the Preliminary Objection is not misconceived, bad in law, an abuse of the court process or subjudice. There is nothing either to show that it is intended to deny the Defendants their right to appeal against the Ruling of lady Justice Odero dated 6th October, 2011.

13. I have also perused the Plaintiffs' Notice of Appeal dated 24th October, 2011 annexed to the Plaintiff's supporting affidavit to the Notice of Motion dated 29th February, 2012. It is merely a notice under Rule 74 of the Court of Appeal Rules, and there is no indication that a stay of execution of any of the orders of the Court issued so far in this matter were, or are sought to be, stayed.

14. Accordingly, and for the reasons aforesated, I hereby dismiss the Preliminary Objection with costs to the Plaintiff:

Dated and delivered this 16TH Day of MAY, 2012

R.M. MWONGO
JUDGE

Read in open court

Coram:

1. Judge: Hon. R. Mwongo

2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d)