



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)  
Civil Suit 466 of 2009**

**PAUL KIBUGI MUIITE. .... PLAINTIFF**

**VERSUS**

**UNIKEN MARKETING SERVICES LTD. .... DEFENDANT**

**BY WAY OF COUNTER-CLAIM**

**UNIKEN MARKETING SERVICES LTD. .... PLAINTIFF**

**PAUL KIBUGI MUIITE. .... DEFENDANT**

**R U L I N G**

The Plaintiff/Applicant, Mr. Paul Kibugi Muite filed a Chamber Summons dated 19<sup>th</sup> October, 2009 seeking inter alia the following reliefs: -

a) .....

b) An order that all the goods carried away in the illegal distress for rent be released forthwith upon the deposit of the said sum of Kshs.900,000/- together with the auctioneers charges in court pending the hearing and determination of this application.

c) An order of injunction be ... issued restraining the defendant its agents... from entering, evicting and/or interfering with the plaintiff's quiet enjoyment/possession of the premises known as L.R. No. 12882/35 Karen and from selling by auction or otherwise goods carried away in the illegal distress for rent pending the hearing and determination of this suit.

d) In the alternative this court be pleased to review its orders dismissing the applicant's Chamber Summons dated 10<sup>th</sup> September, 2009 on the grounds: -

(i) There is now on record an amended plaint in which injunction orders are sought.

(ii) The attempted illegal evictions and the causes of action arising therefrom were not issues before the Hon. Mr. Justice Kimaru and they in fact occurred subsequently and are not res judicata.

(iii) .....

(iv) The goods distrained continue to be held on the basis of a break-in order/distress already set aside by the Principal Magistrate.

(v) There is an error apparent on the face of the record because the court relied on and a sworn affidavit in a preliminary objection where the applicant was not

given an opportunity to fully answer the case brought against him.

It is in respect of the above application by the Plaintiff that the Defendant filed a Preliminary Objection dated 22<sup>nd</sup> October, 2009, now before me for determination. The same raises the following points: -

- 1) The orders of restraining injunction sought in the Chamber Summons dated 19<sup>th</sup> October, 2009 are Res Judicata in view of the ruling of 22<sup>nd</sup> October, 2008 in HCCC No. 633 of 2004; Ruling in Civil Application Number 296 of 2008 on 19<sup>th</sup> December, 2008; Ruling on 4<sup>th</sup> September, 2009 and 8<sup>th</sup> October, 2009 in Miscellaneous Application No. 760 of 2009.
- 2) The Defendant does not require a court order to remove the Plaintiff trespasser from the suit premises.
- 3) The Defendant is entitled to exclusive possession and Plaintiff cannot maintain a claim on trespass and/or an injunction against the defendant registered owner of the suit property.

Both parties filed written submissions which I now turn to consider, after carefully perusing them.

The first issue is whether the orders of restraining injunction sought in the Chamber Summons dated 19<sup>th</sup> October, 2009 are res judicata the rulings dated 22<sup>nd</sup> October, 2008 in HCCC No. 633 of 2004 and the ruling dated 19<sup>th</sup> December, 2008 in Miscellaneous Application No. 296 of 2008 and finally the two rulings dated 4<sup>th</sup> September, 2009 and 9<sup>th</sup> October, 2009 respectively under Miscellaneous Application No. 760 of 2009?

I observe from the onset that the Plaintiff's application aforementioned, is completely similar to another one brought earlier and dated 10<sup>th</sup> September, 2009 except that in this one before me now, the Plaintiff has offered to pay Kshs.900,000/- to the Defendants plus meeting the auctioneer's fees in respect of which such offer was not included in the earlier application. In addition the plaintiff/applicant in this application dated 19<sup>th</sup> October, 2009 has added a new prayer seeking a review of the ruling and orders made under the Chamber Summons dated 10<sup>th</sup> September, 2009 by Mbogholi Msagha, J.

In his ruling in the said application dated 10<sup>th</sup> September, 2009 Mbogholi Msagha, J on the issue res judica of that application vis avis the other applications before it, stated at page 6 of the Ruling: -

“On the issue of res judicata, counsel cannot say that the application is incompetent and does not lie and at the same time say it is res judicata. However, if I were to hold that the application is properly before the court or that it has some relationship to the amended plaint, I would with respect still agree with the learned counsel for the defendant, that the same is res judicata. I say so because the record is replete with restraining orders relating to the same matter and the principle of res judicata applies in equal measure to Chamber Summons and suits.”

The judge then proceeded to refer to decisions that made the matter before him res judicata. He quoted the fact that the matter went to the Court of Appeal at one time on the issue of injunction and that the Court of Appeal gave a conditional stay in respect of the property in question and indeed, in favour of the Plaintiff/applicant in this application before me in Civil Application No. 296 of 2008. Mbogholi Msagha, J then noted that the Plaintiff who was supposed to pay or deposit certain sums of money in order to retain the injunction granted by the Court of Appeal, failed to do so, thus breaching the order and thus also failing to take advantage of the injunction order.

It is clear and it seems to me accordingly, that what Mbogholi Msagha, J was saying is that this application to seek a restraining injunction in respect to the suit property which was before him, was

not sustainable because the Court of Appeal order of injunction still exists and its effect persists in as long as the applicant/plaintiff has not complied with the conditions attached to the order. The effect of it is that he cannot in law seek a fresh similar injunction, in the face of the principle of res judicata. In addition and independent of the Court of Appeal order, Mbogholi Msagha, J of course referred to similar injunction orders in the other applications i.e. HCCC No. 633 of 2004 dated 22<sup>nd</sup> October, 2008 and Misc. Application No. 760 of 2009. In coming to the conclusion above, Mbogholi Msagha, J clearly took into account the fact that the original plaint in this case had been amended and filed on 17<sup>th</sup> October, 2009 and it was in spite of the presence of the amended plaint that he in the alternative ruled that the application

before him, which was similar to this one before me, as already stated above, was nevertheless res judicata the other earlier applications referred to.

What the above means in my view, is that the Applicant/Plaintiff is urging this court to sit on appeal on the same issue that Mbogholi Msagha, J's court decided. That I say I cannot do, as in any case I have no power to do so. On the other hand and in the alternative I find as Mbogholi Msagha J, I did, that this application, despite obtrusively introducing the issue of review, is res judicata the application dealt with by him and is more so, in respect to the other applications referred to by him in his ruling.

In reference to the issue and prayer for a review of the Mbogholi Msagha's J's ruling, it is my view that the order for review cannot instantly be available to the Applicant in this application. This is because the main prayer in his Chamber application before me dated 19<sup>th</sup> October, 2009 is an order for a restraining injunction and release of the restrained goods. By trying to ambush the court under a Chamber Summons to seek for a review process which the law requires to be brought only under a Notice of Motion as provided by order 50 Rule I of the Civil Procedure Rules, the applicant/plaintiff, is abusing the court process. By introducing an otherwise independent process of review in the alternative to another separate and independent relief of injunction, the applicant confirms that the issue of review dawned on him as second thought, a little too late.

In my view however since this court has ruled that this application, more so that part of it that deals with the restraining injunction, as res judicata and therefore amenable to striking out as incompetent for being barred by law to be instituted, the prayer for review in it will go down with the application. I must add however that this court would in the alternative, have struck out the prayer for review as incompetent for being an abuse of the process of court on the ground that the application seeking the relief should have been brought by Motion.

The Summary of what has been discussed above is that I agree with the counsel for the defendant.

As regards the prayer for an order of this court to release the goods distressed for rent arrears and held by the auctioneer for the Defendants, this court observes that payment of their estimated total value of Kshs.11,725,723/- is sought under one of the relief's in the Amended Plaint. Return of the goods is not sought in the said Plaint. Such return would in my view therefore form a strange and/or foreign relief to deal with in an interlocutory application, without amendment of the Amended Plaint. With great respect, the Plaintiff is here repeating an earlier mistake when he sought the relief of an injunction in a suit whose plaint limited itself solely to the reliefs of damages. Mbogholi Msagha, J. found it not possible to consider granting an interlocutory order of injunction thereto.

In this case as well, I hold that the prayer for release of goods distressed for rent, whose value is being sought in the Plaint, is improper and conflicting to the prayer in the Plaint. I accordingly hold that the prayer for release of the goods, if it survives, is unavailable in this application and would be and is hereby struck out with the application.

The summary finding is that the Preliminary Objections to the application dated 19<sup>th</sup> October, 2009 succeeds. The application is hereby struck out and dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 4th day of February, 2010.

.....  
**D A ONYANCHA**  
**JUDGE**