



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Civil Case 9 of 2009

BENJAMIN ONKOBA NYAACHI PLAINTIFF/APPLICANT

VERSUS

KENYA OIL COMPANY LIMITED DEFENDANT/RESPONDENT

RULING:

The plaintiff filed an application dated 15th January 2009 seeking for order of injunction to restrain the defendant and/or its employees, servants/agents from use, occupation and possession of a property known as KISII TOWN/BLOCK III/225, herein after referred to as “**the suit property.**” The application was supported by an affidavit sworn by the plaintiff. He deposed that he is the sole and absolute registered proprietor of the suit property. In 1996 he entered into a sub lease agreement with the defendant over the same. In Kisii HCCC No. 495 of 1997, the plaintiff had sued the defendant over some activities which the defendant had carried out at the leasehold property as a result the defendant vacated the same and the agreement was not renewed.

The plaintiff further deposed that the defendant sought to re-enter the suit premises but did not succeed. He added that the defendant is still trying to re-enter the suit property and embark on its petroleum business thereon. Currently the plaintiff is selling petroleum products on the suit property. In view of the defendant’s threatened action of re-entry, the plaintiff sought the orders aforesaid.

The defendant filed a replying affidavit through David S. Ohana, its General Manager. He stated that the suit is **res judicata** by virtue of Kisii HCCC No. 495 of 1997 which was dismissed and since the plaintiff was not satisfied with the dismissal order, he appealed to the Court of Appeal vide Civil Appeal No. 224 of 2006, which was disposed of by the Court of Appeal by being struck out. The defendant denied having removed its equipment from the suit property and added that the plaintiff is in occupation of the same since the lease agreement was entered into simultaneously with a license agreement for the plaintiff to run the petrol station situate thereon. The petrol station is still being operated with the logo and trade name of **Kenol** which is the defendant’s trade name. The defendant further stated that the lease agreement between itself and the plaintiff is still subsisting and had not been terminated by either party or by operation of the law. In the defendant’s view, the plaintiff’s application and the suit as a whole, is a further move by the plaintiff to buy time and/or frustrate the defendant from enjoying its rights under the lease agreement. The defendant further contended that if the plaintiff’s application is granted, it is the defendant who stands to suffer further losses as she has been shut out of the premises because of protracted litigation since 1997 and which terminated in the aforesaid civil appeal sometimes in December 2008. The defendant urged the court to dismiss the plaintiff’s application arguing that a **prima facie** case had not been demonstrated by the plaintiff.

Mr. Minda for the plaintiff and Mr. Soire for the defendant made brief submissions which I have taken into consideration. It is not in dispute that on 20th June 1996 or thereabout, the plaintiff entered into a lease with the defendant over the suit property. The term of the lease was thirty years which was to run from 1st April, 1996. The purpose of the lease was to enable the defendant operate a business of a petrol station and ancillary services on the suit property. In **Kisii HCCC 495 of 1997** the plaintiff filed a suit against the defendant and some other parties. The plaintiff was seeking, *inter alia*, a permanent injunction to restrain the defendants from interfering with the plaintiff's possession and business on the suit property. The suit was fully heard and determined. A considered judgment was delivered on 26th July 2006. The case was decided against the plaintiff. Thereafter the plaintiff preferred an appeal against the judgment and decree in the aforesaid suit vide **Civil Appeal No. 224 of 2006**. On 4th December 2006 the appeal was struck out by the Court of Appeal. That being the case, I agree with the defendant that this matter is *res judicata*. The orders sought in the present suit are among the orders that were sought in the suit that was heard and dismissed by this court. The plaintiff cannot be allowed to commence other proceedings in the circumstances aforesaid. There has to be an end to litigation.

There is no evidence that the lease that was entered into between the plaintiff and the defendant has been terminated by either party or by operation of the law. It appears to me that the plaintiff has no *prima facie* case as against the defendant, even if his case was not *res judicata*.

I find no merit in the plaintiff's application. The entire suit, being *res judicata*, is an abuse of the court process and is struck out with costs to the defendant. The costs will include the costs of this application.

DATED, SIGNED AND DELIVERED AT KISII THIS 30TH DAY OF APRIL, 2009.

D. MUSINGA

JUDGE.

30/4/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Minda for the Plaintiff

Mr. Sagwe for Mr. Soire the defendant

Court: Ruling delivered in open court.

D. MUSINGA

JUDGE.