



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE 338 OF 2008**

**FRANCIS WABURURU NJAU.....PLAINTIFF**

**VERSUS**

**BERNARD KAGIA NJUGUNA.....DEFENDANT**

**R U L I N G**

Before me is an application by the Plaintiff dated 24<sup>th</sup> March 2009 and expressed to be brought under Order XXXIX Rules 1, 2 3 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act in which the Plaintiff seeks orders:

(1) That the Defendant whether by himself, his servants, agents and/or whosoever be restrained by a temporary injunction from interfering with the Plaintiff's rights of possession, advertising for sale, transfer, leasing or letting the suit premises being **LR No KARAI/KARAI/1373** pending the hearing and determination of this application.

(2) That the Defendant whether by himself, his servants and/or agents be restrained by a temporary injunction from interfering with the Plaintiff's rights of possession, advertisement for sale, transfer, leasing, or letting the suit premises being **LR No KARAI/KARAI/1373** pending the hearing and determination of this suit.

The application is based on the grounds as stated on the body of the Chamber Summons and supported by an affidavit sworn by the Applicant.

The application is opposed by the Defendant who has filed a replying affidavit in which he avers that the suit is **res judicata** as the suit premises was the subject matter in dispute in HCCC No 715 of 2003 in which the Plaintiff was on 19<sup>th</sup> June 2008 ordered to be evicted from the suit premises from the suit premises by the court.

Mr Waiganjo Counsel appearing for the Applicant in his submissions concedes that there was an earlier suit between the same parties and on the same suit premises but submits that the issue of fraud was not raised in that earlier suit and that the claim in the instant suit is for cancellation of the Defendant's title because of fraud.

While Mr. Kinuthia Counsel appearing for the Defendant in opposing the Plaintiff's application submits that the suit is **res judicata** the parties having litigated over the same suit premises in HCCC No 751 of 2003 in which the Plaintiff lost and the court ordered for his eviction.

To constitute res judicata the following conditions must concur.

- (1) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit.
- (2) The former suit must have been between the same parties or between parties under whom they or any of them claim.
- (3) The parties aforesaid have litigated under the same title in the former suit.
- (4) The court which decided the former suit must have been a court competent to try the subsequent suit in which such issue is subsequently raised.
- (5) The matter directly and subsequently in issue in the subsequent suit must have been heard and finally decided in the first suit.

In order that a decision in a former suit may operate as res judicata in a subsequent suit, it is necessary that the court which tried the former suit must have been a court competent to try the subsequent suit.

The test whether or not a suit is barred by res judicata was stated by the Court of Appeal for East Africa in the case of **KAMUNYE AND OTHERS vs. THE PIONEER GENERAL ASSURANCE SOCIETY LTD [1971] EA 263**, where Spry AG P. stated at p. 265:

**“The test whether or not a suit is barred by res judicata seems to me to be: Is the Plaintiff in this second suit trying to bring before the court in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If so the plea of res judicata applies not only to the point which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which parties exercising reasonable diligence might have brought forward at that time.”**

Protection must be given to Defendants against multiplicity of actions in respect of issues that could have been raised and that were not.

The classic judgment on this point is by **VIRGRAM V-C in HENDERSON (1843) 3 HARE 11 – 15**  
He said:

**“I believe and state the rule of the law correctly, when I say; that where a given matter becomes subject of litigation in an adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to that litigation in respect of the same matter which might have been brought forward as part of the subject in contest but which was not brought forward, only because, they have from negligence, inadvertence or even accident omitted part of their case. The plea of res judicata applies, except, in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”**

Guided by the above decisions I agree with Mr Kinuthia that the plea of res judicata is available to the Defendant and find that the Plaintiff has no interest in the suit premises to protect and I decline to issue injunctive orders sought.

Accordingly the application is dismissed with costs.

Dated and delivered at Nairobi this 23rd day of June 2009.

**J. L. A. OSIEMO**

**JUDGE**