



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

**AT NAIROBI**

**CIVIL CASE 271 OF 2009**

**EDOKPOLO OSAMWONYI ..... PLAINTIFF**

**VERSUS**

**JOHN PATRICK MACHIRA ..... 1<sup>ST</sup> DEFENDANT**

**DENNIS MUBEA MACHIRA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

The Plaintiff/Applicant filed a Chamber Summons dated 22<sup>nd</sup> May, 2009 under the provisions of Section 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya and Order 39 rule 1(a) 2 & 3 of the Civil Procedure Rules. The same is supported by the Affidavit of the Plaintiff/Applicant **Edokpolo Osamwonyi**.

The application is seeking for substantive orders as follows: –

- (1) Pending the hearing and determination of this application interpartes, this Honourable court be pleased to temporarily restrain the defendants, their servants, agents and Watt Enterprise Auctioneers and or any other auctioneer firm from distressing for rent, proclaiming, attaching, evicting or in any other way howsoever from interfering with the plaintiff's quiet, enjoyment and peaceful occupation of L.R. NO. 3734/93 Nuru Villas, Town House, No. 8 ( the suit premises)**
- (2) Pending the hearing and determination of suit , the defendants by themselves to their servants, agents, Watt Enterprise Auctioneers be are hereby restrained from distressing , proclaiming, attaching, evicting or in any other way interfering with the plaintiff's peaceful enjoyment and occupation of the suit premises known as L.R. NO. 3734/93 Nuru Villas, Town House, No. 8**
- (3) The costs of this application be in the cause.**

The defendants are opposing the application and have filed a Notice of Preliminary objection and a Replying Affidavit dated both 27<sup>th</sup> May, 2009.

The preliminary objection is based on the following grounds –

- 1. The Plaintiff's suit herein is res-judicata in view of the earlier suit namely, H.C.C.C. No. 40 of 2009 between the same parties and which culminated in a Consent Order recorded in Court on 11<sup>th</sup> February, 2009.**

**2. The Plaintiff's Application is a grave abuse of the process of this Honourable Court as the same is intended to circumvent the Consent Order recorded on 11<sup>th</sup> February, 2009 whereby it was ordered that the Plaintiff to vacate the suit premises by 31<sup>st</sup> March, 2009 unless the parties agreed on a new Tenancy and which was never agreed upon.**

**3. The Plaintiff has no cause of action against the Defendants in view of the Consent Order aforesaid which provided that he vacates the suit premises in the event the parties failed to agreed on a new Tenancy.**

**4. The Plaintiff filed herein is incurably defective as it offends the mandatory provisions of Law and hence it cannot sustain an Injunction Application herein.**

The in his submissions the defendants' counsel raised 3 points of law.

Firstly that the matter before the court is res judicata as parties and the subject matter herein are similar to those in H.C.C.C. NO. 40 of 2009. He contended, that indeed an application in similar circumstances as the current one had been filed in the earlier case.

Secondly, that the earlier suit was compromised through a consent order. He submitted that , the parties are bound by the consent order dated 11<sup>th</sup> February, 2009 . The consent order read in part as follows: –

**“iii the Plaintiff to vacate the premises herein i.e. L. R. NO. 3734/93 Nuru Town House No.8 on 31<sup>st</sup> March, 2009 as per the notice already served but provided that the parties are at liberty to negotiate a fresh tenancy at a rate to be agreed upon.**

**iv The suit be marked as settled”**

Counsel for the defendants' also urged that the said consent order settled the issues between the parties and therefore this matter before the court is an abuse of the court process.

Thirdly, the counsel argued that the suit is incurably defective. That the suit as filed goes against order 7 rule 3 (e)

On his part the Plaintiff's counsel **Mr. Simiyu** in opposing the preliminary objection, maintained that suit is properly before the court. The counsel admitted that H.C.C.C. No. 40 of 2009 had been instituted between the parties and that a consent order had been entered. He however contended that the issues are different therefore the principle of res judicata does not apply.

The contention of the Plaintiff is that he does not owe any rent. That if rent is an issue, then it is a clear issue for determination. That this Preliminary Objection is misplaced.

Having considered the facts placed before me, submissions by both counsel & case law cited, I find that the Preliminary Objection raises two substantive issues for the courts consideration :–

1. Whether the current suit is res judicata and
2. Whether the plaint is defective.

The following facts are not in dispute namely;-

1. That the Plaintiff filed H.C.C.C. No. 40 of 2009 on the 31<sup>st</sup> January, 2009 against the defendants.
2. That the subject matter in H.C.C.C. NO. 40 of 2009 was the Same suit premises being L.R. No. 3734/93 Nuru Villas, Town House No.8.

3. That in the earlier suit the Plaintiff's claim in court was that that the defendants had declined and/or refused to accept rent for the month of January, 2009 and subsequent months and instead had sent auctioneers to harass and intimidate him. He wanted the courts protection from harassment and intimidation. His prayers were

(a) General damages

(b) permanent injunction restraining the Defendant/Respondent, their servants, Auctioneers and/or agents or otherwise howsoever be restrained from distressing, proclaiming, attaching, evicting or in any other way howsoever be restrained from interfering with the Plaintiffs quiet enjoyment, occupation or use of all that piece of property situate in Nairobi and known as **L.R. No.3734/93**, Nuru Villas, Town House No.8.

(c) Costs of this suit and interest thereon.

3. In the current suit the subject matter is the same L.R. NO. 3734/93 Nuru Town House No. 8

4. The Plaintiffs claim is once again, harassment by the defendants and Watts Auctioneers allegedly levying distress for rent. He is seeking for the following prayers.

(a) General damages

(b) A permanent injunction restraining the defendants, by themselves their servants, auctioneer and/or any other agents from distressing, proclaiming, attaching, evicting or in any other way howsoever, from interfering with the Plaintiffs quiet possession and occupation or use of all that property situate in Nairobi and known as L.R. No. 3734/93 Nuru House No.8 (suit property)

(c) Costs of this suit and interest

(d) Any other relief that this honourable court may deem fit to grant.

There is no doubt from the above extract of both the complaints that the reliefs being sought in both suits are similar. The bone of contention is the tenancy of **L.R.NO. 3734/93, Nuru villas Town House NO 8**.

Is the suit res judicata in terms of S. 7 of the Civil Procedure Act? S.7 provides: –

**“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 issues has been subsequently raised, and has been heard and finally directed by such a court.”**

The consent order which I quoted above stated in part as follows-

**“The suit be marked as settled”**

In my mind the said statement indicated that the matter had been finalized and there were no issues pending at the time the same was recorded.

The question for me to address is whether, the Plaintiff with facts laid as above, can now seek relief similar to the previous one in the current matter? The Plaintiff's lawyer contends that there is a triable issue i.e. whether rent has been paid to date. To my mind the consent order, dealt with the issue of paying rent and how the parties will conduct themselves post the consent order. I take note that the reliefs being sought in the two suits are similar contrary to the submission by the plaintiff's counsel. In **GARDEN SQUARE LTD vs KUGO & ANOTHER** (2003) KLR Ringera J had this to say on the Principle of res judicata –

**“--- in particular the Plaintiff sought to prevent the defendant from erecting houses thereon and from interfering with sewerage and from water drainage and/or high voltage power lines. That is substantially the same relief which is sought in the present suit and application --- seen that way I am in agreement with the submissions of counsel for the defendants that those issues having been resolved by way of the consent order recorded in the earlier suit in the terms I have already set out, the present suit is res judicata and is for striking out ....”**

Guided by the holding of Ringera J and the fact that indeed this case is similar to the previous suit between the parties, I find that the matter before me is res judicata.

Having found that the suit is res judicata, it may not be necessary for me to consider the issue of the consent order, and the contention that the plaint is defective, doing so will be a mere academic exercise, nevertheless since counsels addressed the court on the same, I will consider the same.

It is trite law that a consent order is as binding to all parties as a Judgment or order pronounced by the court. In **FLORA N. WASIKE V. DESTIMO WAMBOKO (1982-88) 1 KLR 635**, the Court of Appeal held in part-

**“It is settled law that a consent Judgment can only be set aside on the same grounds as would justify the setting aside of a contract, for example on fraud, mistake or misrepresentation.”**

In this instance, parties are in agreement that the consent was agreed upon as recorded. They do not doubt the content either. However the Plaintiff’s counsel contends that he is in court because of clause 3 of the consent which stated –

**“The Plaintiff to vacate the premises herein i.e. L.R. No. 3734/93 Nuru Town House on 31<sup>st</sup> March, 2009 as per the notice already served but provided that the parties are at liberty to negotiate a fresh tenancy at a rate to be agreed upon”**

In my view Clause 3 is explicit and indeed concludes the issue in very clear terms, in that the Plaintiff is to vacate or negotiate new terms. If there is no agreement, inevitably the Plaintiff vacates. The alternative is not to rush to court with a fresh suit, as to do so is to circumvent and frustrate the consent order. This is a clear abuse of the court process, and should be discouraged by all means.

Is the plaint incurably defective for not complying with Order VII rule 1(e)? The rule provides-

1 (1) the plaint shall contain the following particulars-

**(e) “An averment that there is no other suit pending, and that there have been no previous proceedings, in nay court between the Plaintiff and the defendant over the subject matter.”**

The current plaint states in paragraph 14 –

**“There is no other suit and or other related proceedings pending before this or any other relating to the same subject matter.”**

The paragraph fails to disclose that there was a previous suit relating to the subject matter. According to the defendants’ counsel this non disclosure is misleading and therefore makes the plaint a nullity. The plaintiff’s counsel contends that the said paragraph is not misleading and has set out the true position of the case. I do not agree with the defendants counsel although at a glance paragraph 14 is not clear. However the body of the plaint acknowledges that there was a previous suit.

Having upheld the preliminary objection on the ground that the suit before me is res Judicata, it therefore follows that the application and the suit against the defendants must be dismissed with costs to the defendants.

Dated and delivered this 15<sup>th</sup> June, 2009.

**ALI- ARONI**

**JUDGE**