REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 40 of 2003

PETER G.N. NGANGA……..…….....…….PLAINITFF

VERSUS

DANIEL GICHANGA KARIUKI T/A WATTS ENTEPRISES (FIRM).....…1ST DEFENDANT

NATIONAL BANK OF KENYA LTD…….....…….2ND DEFENDANT

R U L I N G

The Plaintiff's application is by Notice of Motion dated 31st of October 2006. The application seeks the following orders:

1. That the Honourable court be pleased to grant interim orders to stay unlawful transfer of the plaintiffs property/Title Number Kajiado/Olooloitokishi/Kitengala/2913 to third parties pending the hearing and determination of this application until further orders of this Honourable court.

2. That there be judgment on admission entered pursuant to the provisions of Order XII Rule 6 of the Civil Procedure Rules against the 1st defendant/1st Respondent as prayed for in the Amended plaint for failure to file a defendant to the plaintiffs claim herein despite service of summons to enter appearance together with the statement of claim.

3. That further the 2nd defendant/2nd Respondents statement of defence be struck out with costs for want of service contrary to the mandatory provisions of order viii Rule 1 (2) of the Civil Procedure Rules.

4. That further or in the alternative summary judgment be entered against the 2nd defendant/2nd Respondent in terms of the prayers sought in the Amended plaint.

5. That the costs of this application be borne by the Defendants /Respondents herein.

The plaintiff prior to filing the present application filed an application in Court by way of Notice of Motion dated 27th September 2005. In that application the plaintiff sought various prayers amongst which was an injunction. That application was heard by the Honourable Justice Ochieng who by his ruling dated 25th of October 2005 dismissed the same. With that in mind therefore it does seem clear that some of the prayers that the plaintiff seeks in this application are Res judicata for they were either entertained by the court during that previous application or they ought to have been brought up at the hearing of the same. That is in keeping with Section 7 Explanation 4 of the Civil Procedure Act. That

section deals with matters that have been entertained, heard and determined by a competent Court and the Section bars any subsequent entertainment of the same. Explanation 4 deals with matters that could have been raised or ought to have raised at that application. The same is also barred from being raised subsequently. Section 7 explanation 4 of the Civil Procedure Act 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 issue has been subsequently raised, and has been heard and finally decided by such court.**

Explanation (1)…

Explanation (2)…

Explanation (3)…

Explanation (4) – any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit".

The *locus classicus* of that aspect of *res judicata* is the judgement of Wigram VC in **Henderson v Henderson (1843) Hare 100, 115** where the Judge says as follows:-

"**Where a given matter becomes the subject of litigation in, and of 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 open the same subject of litigation in respect of 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 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".**

I would isolate the following issues raised by the Plaintiff which I find are Res Judicata to the present application. Firstly, the plaintiff in this matter and in the previous application heard by Hon Justice Ochieng argued that when defendants suit, namely ***HCCC NO. 390 OF 1999*** was dismissed for want of prosecution the plaintiffs indebtedness was discharged. Secondly, the plaintiff had in this application raised the issue of alleged failure to get consent to charge the property and the defendant's alleged failure to serve statutory notice on the plaintiff. Such submissions ought to have been brought before court in respect of the previous injunction application. Failure to bring them up then runs against the provisions of Section 7 Explanation 4 of the Civil Procedure Act. Thirdly, the plaintiff in his supporting affidavit stated that the principal debtor which he guaranteed by charging his property did not receive the finances as alleged by the 2nd defendant. That issue too ought to have been part and parcel of the previous injunction application.

The plaintiff in the first prayer seeks that the Court will grant an interim stay of the alleged unlawful transfer of the suit property namely Title No. Kajiado/Olooloitosishi/Kitengela/2913. It is not clear to the Court and considering that prayer whether what the plaintiff is seeking in around about way is an injunction that he did not get before the Honourable Justice Ochieng when he delivered his ruling on the 25th of October 2005. The other thing that plaintiff does not do is to explain to whom the Defendant is intending to transfer the property, in other words the plaintiff does not explain whether indeed the charged property has been sold and hence why he now seeks an order to stay transfer. If the later be the position then it was imperative for the plaintiff to join that Purchaser into this proceedings for indeed the Court cannot give orders without hearing him if he has already purchased the property. In other words the court

cannot grant orders that would be detrimental to a party not before it. In going through plaintiff's affidavit in support and considering the submissions that were made on his behalf by his Advocate, I do find that the plaintiff fails to make it clear why he seeks a stay of transfer of the charged property. He does not explain whether indeed a sale did take place.

In considering the second prayer which seeks judgment on admission against the first defendant, I am of the view that that prayer is misconceived. In his affidavit in support of the application the plaintiff stated that the 1st defendant had failed to file a defence in this matter despite service of summons to enter an appearance. It is on the basis of that failure that the defendant seeks that judgment be entered against the first defendant on admission as provided under Order XII Rule 6 of the Civil Procedure Rules. What the plaintiff ought to have done is to apply for Interlocutory Judgment against the first defendant as provided by Order IXA Rule 5 of the Civil Procedure Rules. On making such an application in writing the Registrar as provided by Order XLVIII Rule 2[a] could have entered judgment in favour of the plaintiff. On the other hand looking at the plaintiff's amended plaint which was filed in Court on the 20th March 2003, I find that the only claim against the first defendant is for an injunction to stop him who is described as the servant of the second defendant from selling the charged property. The first defendant was at all material times instructed to sell the plaintiff charged property at an auction which was what provoked the present action. Even if a judgment was entered against the 1st defendant the Court does not understand how that would assist the plaintiff because it is open to the second defendant at any subsequent sale by auction of the charged property to instruct another firm of auctioneers. In the courts view the prayer for judgment on admission is untenable.

The plaintiff does also in this present application pray that summary judgment be entered against the 2nd defendant. Summary judgment is under Order XXXV of the Civil Procedure Rules. Under Rule I it is clear that summary judgment can be applied for where the plaintiff in his claim has made or seeks judgment for a liquidated demand with or without interest. In the case of recovery of land by a Landlord from a Tenant the court will also entertain a summary judgment application. Those are the only two circumstances under which a party can seek a summary judgment. The plaintiff's claim does not fall under those two circumstances. He does not pray in his Plaint for judgment for a liquidated amount and he is not a Landlord who is seeking possession of land from a Tenant. It is obvious therefore that the plaintiff's claim against the second defendant seeking Summary Judgment must fail.

The final prayer that the plaintiff seeks in this present application is for the striking out of the 2nd defendant's defence for failure to serve the defence on the plaintiff. The plaintiff argued that Order VIII Rule I[2] of the Civil Procedure Rules requires that a defence on being filed be served on the plaintiff within 15 days thereafter. The plaintiff stated that todate the 2nd defendant has not served him with the defence. In his argument the plaintiff's advocate stated that it was not until he sought the documents necessary for filing an appeal against a previous ruling in this matter that he found that a defence had been filed. In response to this argument defence counsel relied on a Court of Appeal judgment in the case of ***Trust Bank Ltd V Amalo Company Ltd*** [2003] I EA page 350.

The holding of that case is in the following terms:-

"**In that case at a hearing of an application in the superior court the judge struck out documents in reply of an application for failing to serve the documents in time on his opponent. On an application being made for those documents to be expunged, the judge entertained that application and expunged the documents and proceeded to hear the applicant without entertaining the Respondent**."

It is on that basis that the Court of Appeal held that where possible disputes should be heard on their own merit. The defendant faulted this prayer of the plaintiff on the basis that the plaintiff had obtained a copy of the defence since it was filed and consequently ought to have made the application for striking out the defence much earlier on and ought not to have waited up to this time.

Having considered those arguments I am of the view that I will be guided by the decision of the Court of

Appeal as stated herein before in that I find that it is important for a case such as this one be heard on its own merits and since the plaintiff has confessed to having in his custody the defence filed on record, I find that the plaintiff will suffer no prejudice in this matter. I will therefore decline to grant the prayer that is sought by the plaintiff in this regard. In the court's view the plaintiff's application by Notice of Motion dated 31st October 2006 has no merit is misconceived and the same must and does fail. Accordingly the court does hereby dismiss the said application with costs to the defendant.

Dated and delivered on this 5th day of February 2007

MARY KASANGO

JUDGE