



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1203 of 2006**

**GEORGE GIKURU MBUTHIA.....PLAINTIFF**

**VERSUS**

**HOUSING FINANCE COMPANY OF KENYA.....1<sup>ST</sup> DEFENDANT**

**HON.THE ATTORNEY GENERAL (Representative of Registrar of**

**Titles – Nairobi and Senior Principal Magistrate Milimani – Nairobi..2<sup>ND</sup> DEFENDANT**

**MUHAMUD SHEIKH HUSSEIN.....3<sup>RD</sup> DEFENDANT**

**RULING**

The Plaintiff filed this suit against the Defendants on 15<sup>th</sup> November, 2006 seeking various orders namely: a permanent injunction restraining the Defendants from remaining or continued occupation of the suit property LR NO.36/11/1 Section II Eastleigh Nairobi; a mandatory injunction to restrain the Defendants from continued detention of the Plaintiffs various properties as named in the plaint; a mandatory injunction to remove structures erected on the suit land; a declaration that the suit property lawfully belongs to the Plaintiff, reinstatement to the suit property; damages for trespass; exemplary damages; mesne profits; consequential aggravated damages and exemplary damages at court rates; costs of the suit together with interest.

Simultaneously with the Plaint the Plaintiff brought a Chamber Summons dated 15<sup>th</sup> November 2006 seeking orders:

A. That a mandatory injunction do issue to restrain the 1<sup>st</sup> and 3<sup>rd</sup> defendants whether by themselves, transferees, servants, agents, tenants or otherwise howsoever from remaining or continuing in occupation and from disposing off, alienating, leasing, renting and transferring, erecting structures or in any other manner dealing with the suit property namely LR. NO. 36/11/1 Eastleigh Section II Nairobi.

B. That a mandatory injunction do issue to restrain the 1<sup>st</sup> and /or 3<sup>rd</sup> Defendants from continued illegal detention of the Plaintiffs property namely: office furniture, case files and records, log books for 12 motor vehicles, insurance files, property files, 30 title deeds, tenancy and other leases, personal files, cash Shs.300,000/=, whole library for legal and accounting text books, legal authorities, computers, valuation reports for vehicles and property, spare parts and tyres for vehicles, a filing cabinet, 60 steel doors, accounting records for Palace Investments Ltd, Totos Outfitters Ltd, Equity Protectors (K) Ltd and Classic Hygienic Products Ltd, CCTV Cameras and Television etc.

C. That a mandatory injunction do issue directing the Registrar of titles – Nairobi to cancel and expunge

entry No.6 and 13 of Folio No. 308 – Volume – N 48 made on 11<sup>th</sup> August 1983 and 28<sup>th</sup> April 2006 respectively from the register.

D. That a mandatory injunction do issue directed to the 3<sup>rd</sup> Defendant to remove the structures shoddily constructed on LR NO. 36/11/1 Eastleigh Section II and if the 3<sup>rd</sup> Defendant does not comply, the Applicant do remove the said structures at the 3<sup>rd</sup> Defendant's costs.

E. That a declaration be made that LR NO. 36/11/1 Eastleigh Section II Nairobi lawfully belongs to the applicant and that the 1<sup>st</sup> and 3<sup>rd</sup> Respondents are trespassers.

F. That costs of this application and the suit be paid by the Respondents.

The application is based on the grounds running to 51 paragraphs as stated on the body of the Chamber Summons and is also supported by an affidavit sworn by the Applicant on 15<sup>th</sup> November 2006. When the matter came up for hearing, Mr. Ahmednasir counsel for the 3<sup>rd</sup> Defendant raised a Preliminary Objection on a point of law in that:-

1. The matter before the court is Res-judicata within the meaning of Section 7 of the Civil Procedure Act.
2. That the matter herein offends Section 6 of the Civil Procedure Act in the light of subsisting suits being HCCC NO.162 OF 2006 and HCCC 402 of 2006 and the court has no jurisdiction to hear the application for injunction.
3. The Plaintiff has no proprietary rights over the suit property, is a stranger to the same and the court has no jurisdiction to hear the application for injunction.
4. The Plaintiff fails to plead a cause of action known to Kenyan Law as against the 3<sup>rd</sup> Defendant.
5. The suit before the court is wanton abuse of court process and must be dismissed in limina.

Section 6 of the Civil Procedure Act provides as follows:

**“7” 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 substantially raised, and has been heard and finally decided by the court.”**

Mr. Ahmednasir counsel for the 3<sup>rd</sup> Defendant submitted that this matter is res-judicata within the meaning of Section 7 of the Civil procedure Act. He also submitted that the entire suit offends the provisions of Section 6 of the Civil Procedure Act because there are 2 other suits between the same parties before this court being HCCC NO. 162 OF 2006 and MISC. APPLICATION NO.402 OF 2006. Counsel referred the court to the ruling of Wendoh J in HCCC NO.402 OF 2006 to prove that the present suit is indeed res-judicata.

It was argued on behalf of the Defendant that this suit should be dismissed for being res-judicata. MISC. APPLICATION 402 OF 2006 was a Judicial Review which was withdrawn and an application to further amend the defence was struck out in HCCC NO.162 OF 2006.

The applicant appeared in person and in opposing the Preliminary Objection submitted that the plea of res-judicata is not available to the Defendant because MISC. APPLICATION NO. 402 OF 2006 was a Judicial Review Application which was withdrawn and HCCC NO. 162 OF 2006 was an application for further amendment of the defence which was struck out. To be res-judicata there has to be a final decision on every fact.

Mr. Mbutia also cited HCCC NO. 4140 OF 1990 in which Housing Finance Company of Kenya Ltd had sued him seeking for orders for possession of Plot Number 36/11/1 Section II Eastleigh in Nairobi which is also the subject matter of this suit, and in which the court declined to issue the orders sought and made the following orders:

(1) That no order is made for possession of the property known as Plot Number 36/11/1 Eastleigh Section II.

(2) That the Defendants' application dated 7<sup>th</sup> May 1991 be heard on a day to be fixed in the registry.

He does not understand how Housing Finance Co. of Kenya could transfer the suit property while this suit was pending.

In conclusion he submitted that there is no final decision that has ever been made in this matter and therefore the plea of res-judicata is not available to the Defendant.

The Defendant's contention is that this suit is res-judicata and has cited the two decisions I have quoted earlier which involved the same parties and the same subject matter.

It is strite law that not every matter decided in a former suit that can be pleaded as res-judicata in a subsequent suit. To constitute a matter res-judicata the following conditions must concur.

(i) 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.

(ii) The former suit must have been a suit between the same parties or between parties under whom they or any of them claim.

(iii) The parties as aforesaid have litigated under the same title in the former suit.

(iv) 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.

(v) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit.

The test whether or not a suit is barred by res-judicata was stated by the Court of Appeal for East African in the case of KAMUNGE AND ANOTHER VS. THE PIONEER GENERAL ASSURANCE SOCIETY LTD 1971 EA 263 at p.265 in which LAW Ag. V.P. said:

**“The test whether or not a suit is barred by res-judicata seems to me to be – is the Plaintiff in the 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 had already put before a court of competent jurisdiction and which has been adjudicated upon. If so the plea of res-judicata applies not only to points upon which the first court was actually required to adjudicate 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.”**

The subject matter in the subsequent suit must be covered by the previous suit for res-judicata to apply. JADVA KARASAN VS. HARNAM SINGH BHOGAL [1953] 20 EACA 74.

The two suits cited by the Defendant were not decided on merits and no final decision was reached.

The ruling of Kasango J delivered on 10<sup>th</sup> July 2006 related to the Defendant/Applicant's Notice of Motion dated 21<sup>st</sup> June 2006 in which the Applicant sought the following prayers:

(1) That leave be granted to the Defendant to further amend his defence and counterclaim in terms of the further amended draft defence and counterclaim annexed therein.

(2) That the Defendant's further amended defence and counterclaim be treated as properly filed.

A Preliminary Objection had been raised and the Judge in her ruling upheld the Preliminary Objection and struck out the Applicant's Notice of Motion with costs. The other suit referred to by counsel for the Defendant in his Preliminary Objection is HC MISC. CIVIL APPLICATION NO. 402 OF 2006. This involved a Judicial Review application dated 20<sup>th</sup> July 2006 which was withdrawn before Wendoh J on 23<sup>rd</sup> April 2006.

The Judge further ordered:

(i) That the Notice of Motion dated 10<sup>th</sup> August 2006 do proceed to hearing.

(ii) That the Applicant do file affidavit under Order 53 Rule 3 (3) and do serve of all the parties.

(iii) That parties do file and exchange written submissions within 14 days of today's date.

(iii) That this matter be mentioned on 10<sup>th</sup> May 2006.

(iv) That all other parties be served with the court order.

Res-judicata by its very words means a matter on which the court has exercised its judicial mind and has after argument and consideration come a decision on a contested matter.

The two suits cited by the Defendant were not decided on merits and no final decision was reached and therefore the doctrine of res-judicata could not apply and it follows therefore that the plea of res-judicata is not available to the Defendant.

I dismiss the Preliminary Objection with costs.

Dated and delivered at Nairobi this 17<sup>th</sup> day of May, 2007.

**J.L.A. OSIEMO**

**JUDGE**