



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 442 of 2006**

**SAMUEL MUNYI KAMAU & 14 OTHERS .....PLAINTIFFS**

**VERSUS**

**CHARLES MWANGI KAGONIA**

**MANSUKHLAL D. POPAT**

**JITENDRA POPAT .....DEFENDANTS**

**R U L I N G**

In the plaint filed on 4/8/2006 the plaintiffs claimed a permanent injunction restraining the defendants and/or their servants or agents from restraining or evicting the plaintiffs from LR. No.209/138/25, Tea Room Exhibition, River Road, Nairobi. The plaintiffs further claimed for an order to pay rent directly to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and the balance of the rent thereof be used to pay for security, water, electricity and service charge and any residue thereof be deposited in Court or in an interest earning account. Those reliefs were sought on the grounds that the plaintiffs at all material times were sub-tenants of the 1<sup>st</sup> defendant on the suit premises who has been collecting rent from the plaintiffs but has not been remitting the same to the Landlords: the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. On 7.7.2006 the 2<sup>nd</sup> and 3<sup>rd</sup> defendants without notice to the plaintiffs proclaimed the plaintiff's goods and tools of trade for non-payment of rent by the 1<sup>st</sup> defendant and on 22.7.2006 the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' agents attempted to evict and levy distress against the plaintiffs and attempted to carry away their goods but the plaintiffs resisted the same as they were not in rent arrears and had in any event made three to six months rent deposits with the 1<sup>st</sup> defendant, an agent of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

Simultaneously with the plaint, the plaintiff filed an interlocutory application by way of Chamber Summons in which they sought a temporary injunction to restrain the distress for rent and their eviction from the suit premises pending the hearing and determination of this suit.

On 10.8.2006, the plaintiffs moved the court under a certificate of urgency for an interim injunctive relief. A temporary injunction was issued restraining the 2<sup>nd</sup> and 3<sup>rd</sup> defendants from distraining for rent until the hearing of the application inter partes on 28.8.2006.

Eventually the application was listed for hearing before me on 31.10.2006. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants raised objection based on a Notice of Preliminary Objection dated 16.10.2006 on three grounds:-

- 1. That the application is misconceived, bad in law and frivolous.**

**2. That the application and the suit are sub-judice and Res judicata.**

**3. That the plaintiffs lack locus standi/capacity to bring the suit as against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.**

I have heard the rival submissions on the Preliminary Objection. It has emerged that the principal complaint was one of res judicata. On that complaint, counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants submitted that there had been previously HCCC No.96 of 2005 between the 1<sup>st</sup> defendant as plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as defendants. It is also contended that there is HCCC No.741 of 2005 between the 1<sup>st</sup> defendant as plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants together with others as defendants. It is contended by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants that the other suits involve the same premises and the tenancy in respect of the same premises. The basis of the Preliminary Objection is Section 7 of the Civil Procedure Act. The Section reads as follows:-

**“Section 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 subsequently raised, and has been heard and finally decided by such court.**

**Explanation (5): Any relief claimed in a suit which is not expressly granted by the decree shall for the purposes of this Section be deemed to have been refused.”**

It is not in dispute that the plaintiffs were not parties to HCCC No.96 of 2005. One of the reliefs sought in this suit is for an order allowing the plaintiffs to pay rent directly to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. That issue was not and could not have been an issue in the former suit. In the premises I hold that in the circumstances of this case the doctrine of res judicata does not apply to the plaintiffs’ suit and application.

With regard to the objection that the application is sub judice by reason of the existence of HCCC No.741 of 2005, I note that the plaintiffs herein are not parties to that suit. Even if the plaintiffs had instituted that suit, by dint of the provisions of Section 6 of the Civil Procedure Act the mere fitting of the present suit perse would not attract the sanction of striking it out. In any event the issues raised in this suit although touching on the same premises cannot be said to be the same. It would however be convenient to try the issues in HCCC No.741 and the issues herein together. But in my view the plaintiff’s application and suit cannot be defeated on the ground that they are sub judice.

With regard to the complaint that the plaintiffs’ lack capacity to bring this suit against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, I note that in fact the plaintiffs seek an order that they be allowed to pay rent directly to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. It is not disputed that the plaintiffs are in possession of the suit premises. They seek recognition of their status. That is an issue which the court has to make a determination thereon. It cannot be determined on the Preliminary Objection raised by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Having found that the plaintiffs’ application and suit are not sub judice or res judicata and that the issue of capacity and locus standi has not been well taken, it is plain that the plaintiffs’ application is not misconceived, bad in law or frivolous. I must therefore over-rule the Preliminary Objection with costs to the plaintiffs.

It is so ordered.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> day of November 2006.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:- Kahuthu for the plaintiff and Njuguna, Ms. for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants

and Mwangi for the 1<sup>st</sup> defendant.

**F. AZANGALALA**

**JUDGE**

**29/11/06**