REPULBIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 1289 OF 2002

PAUL MUIRA ……...……..……..1ST PLAINTIFF

RUTH WANGUI MUIRA…….…..….2ND PLAINTIFF/APPLICANT

VERUS

JANE KENDI IKINYUA…….…..…….……..1ST DEFENDANT

NAIROBI CITY COUNCIL……..…….….. 2ND DEFENDANT

CHIEF LAND REGISTRAR……. 3RD DEFENDANT

RULING

The instant application came by way of Chamber Summons taken out by the Plaintiff and was dated and filed on 3rd November, 2004. It was brought under Order XXXIX, rules 1, 2, 3 and 9 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act (Cap. 21).

Its substantive payer was that:

> "A temporary injunction do issue restraining the first Defendant, her agents, servants, contractors and/or workmen from trespassing, damaging, wasting, constructing, erecting any house, structure or building of any description whatsoever or otherwise interfering with plot No. Nairobi/Block 63/578 until the hearing and determination of this suit."

Grounds stated are that the Court had already restrained the Defendants from alienating, mortgaging or transferring the suit property, yet the first Defendant has continued constructing on the suit property and thereby altering its physical state. The first Respondent is said to be wasting, damaging and constructing structures on the Plaintiff's land. These grounds are elaborated in the depositions of the second Plaintiff dated 3rd November, 2004.

The first Defendant responded by filing a notice of preliminary objection, dated 10th November, 2004.

At the hearing of this matter on 11th November, 2004 ***Mr. Kilukumi*** appeared for the Applicants, while ***Mr. Nyaga*** appeared for the first Defendant and Mr. Guseyo for the second Defendant.

Mr. Kilukumi said the Plaintiff was seeking interim relief, pending the hearing of the main suit which had been scheduled for 14th and 15th February, 2004. He said the interim order issued on 23rd October, 2002 had held, but only until 20th October, 2004 when the first Defendant resumed the activities which had been the subject of injunction orders. The consent order, learned counsel stated, had not extended to *construction*, and so the first Respondent has now exploited this loophole to undertake construction.

Learned counsel, **Mr. Nyaga** had a preliminary objection to raise, specifically, that the instant application was res ***judicata*** , as the earlier application of 30th July, 2002 was being replicated, which application had similarly been brought under Order XXXIX rules 1, 2 and 3. That earlier application, counsel stated, had covered all the matters now being raised. The first Defendant had at the time already begun construction; and the ***ex parte*** injunction granted then, came up for ***inter partes*** hearing on 23rd October, 2002. On this occasion a *consent order* was made touching on the following matters: *trespass; construction; proprietary interests* . It had also been recognised that the *Plaintiff had only an allotment letter*, whereas the first Defendant has a certificate of lease. ***Mr. Nyaga*** submitted that the Plaintiff's application of 3rd November, 2004 was seeking to restrain the first Defendant in the same manner as had been sought in the application of 30th July, 2002 which had been heard and determined. He urged that the rule of res ***jud icata***, provided for under Section 7 of the Civil Procedure Act (Cap. 21), be applied and the application be dismissed.

Learned counsel, ***Mr. Kilukumi*** submitted that res ***judicata*** under Section 7 of the Act only applied where a matter had been heard and determined by the Court. Can a second application be brought on the same happenings? Learned counsel submitted that the Court should allow a party to come before it as many times as the circumstances on the ground changed. And for this proposition he cited the Court of Appeal decision in Mburu Kinyua v. Gachini Tuti [1978] KLR 69. He cited from the judgement of ***Madan, JA*** [p.73]:

> **"I am not aware of any bar generally to presenting more than one application until the conscience of the Court comes to rest at ease that justice has been done. I would not go so far as to say that the Court must act whether or not there is a right of appeal, review or application. It would depend on the circumstances in each case. Moreover, the liberty to present more than one application is always subject to the Court's power to prevent abuse of its process, including mulcting the offending party in costs. It is also of course subject to the rule of res judicata …**"

The above passage, it is to be noted, comes from a dissenting opinion, unlike that which appears in the judgement of ***Law, JA*** (p.81)

> "**…an Applicant whose application to set aside an ex parte judgement has been rejected has a right of appeal. Alternatively, he may apply for a review of the decision…*He can only success fully file a second applicatio*n if it is based on facts not known to him at the time he made the first application. If the facts were known to him, his second application will be dismissed as *res judicata*, as happened here. The position otherwise would be intolerable. A decree-holder could be deprived of the benefits of his judgement by a succession of applications to set aside the judgement, and judges would in effect be asked to sit on appeal over their previous decisions or those of other judges. As regards Madan JA's expressed feeling that justice can only be done by giving the appellant the right to defend, I would respectfully point out that there are always two aspects to the concept of justice. A successful litigant is convinced that justice has been done, the loser is unlikely to share that view. In this case, the Respondent is shown to have some merits in his favour."**

Although the judgements given by the two learned Judges of Appeal were different in their tenor and effect, I think their positions on "repeat applications" is not necessarily fundamentally opposed, though I think it is the passage from the judgement of ***Mr. Justice Law*** that best captures the spirit to guide this Court in dealing with applications made by parties with respect to previous orders in the same proceedings.

Mr. Kilukumi submitted that the instant application was properly brought before the Court, because there is a fact which had not been known at the time of the earlier application, namely, the fact that *construction* had started on the suit premises. He urged that the status quo ought to be maintained, so that the face of the suit land is not altered pending the hearing and disposal of the main suit.

Learned counsel, ***Mr. Kilukumi*** contended that the doctrine of ***res judi cata*** did not apply to this matter because the matter in issue had not been decided between the parties; and he cited ***Halsbury's Laws of England,*** 4th ed., Vol. 16, at para. 1528:

> **"A plea of res judicata must show either an actual merger, or that the same point has been actually decided between the same parties. Where the former judgement has been for the Defendant, the conditions necessary to conclude the Plaintiff are not less stringent. It is not enough that the matter alleged to be concluded might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue or claimed."**

Counsel submitted that the point about construction had not been decided by the Court, as between the parties. He further cited a passage in ***Mr. Justice Kuloba's Judicial Hints on Civil Procedure ,*** at page 49:

> **"Under Section 7 if any issue has been directly and substantially in issue in a suit which has been heard and finally decided it cannot again be reagitated and tried. The effect of a consent order is the same as that of judgement given after the exercise of a judicial discretion."**

Mr. Kilukumi viewed these authorities as supporting the position that the plea of res ***judicata*** cannot stand where the question was not expressly decided by the Court or tribunal. He contended that the ***construction*** question, in relation to the suit land, had not been expressly raised; and therefore it had not been determined so as to give rise to the plea of res judicata.

Mr. Kil ukumi submitted, and quite correctly, with respect, that the main issue in the cause is with regard to ownership of the suit land, which issue is yet to be determined. He pleaded that the ends of justice would dictate a safeguarding of the paths leading to the determination of that substantive question. In his view, the Plaintiffs had an important claim which transcended the weight of just the letter of allotment; and in the circumstances, their prayers at this stage deserved a hearing.

Mr. Guseyo for the second Defendant, while avowing he would not wish to take sides, declared: "*We do not oppose the preliminary objection."* No legal argument was however presented, and so I was unable to appreciate the City Council's contribution to the resolution of this dispute.

Mr. Nyaga returned to the effect of consent in a Court order, and its implications for the ***res judicata*** rule. He submitted that a consent order was as good as a judgement, and so such an order once made, sufficiently covered its subject and could no longer be opened to a new application seeking a similar order. He submitted that the ***construction*** question at the suit premises w*as not heard by the judge because the parties, upon that point, reached a consent which was embodied in the orders of th e Court* . **Mr. Nyaga** contended that construction at the suit premises was an element in the earlier application, and orders on the matter had been granted ex parte ; but at the stage of ***inter partes*** hearing, and under the consent orders, the Plaintiffs had agreed to this element being excluded. Referring to ***Mburu Kinyua v. Gachini Tuti*** [1978] KLR 69 ***Mr. Nyaga*** submitted that the issue of construction at the suit premises was not a new matter which could justify the Plaintiff's application.

I have been able to see the Plaintiffs earlier application, by the Chamber Summons of 30th July, 2002 and it is quite clear that *it sought injunctive relief against construction by the first Defendant at the suit premise*s. A consent order was on 23rd October, 2002 recorded, by ***Mr. Justice Kuloba*** , and I think *this order must have had in contemplation the specific prayers which were carried in the said application* . I will agree, therefore, with learned counsel for the first Defendant that the issues covered in the application of 30th July, 2002 which were already the subject of Court orders, *cannot properly be reproduced in the instant application which, consequently, is* ***res judicata*** . Applying the principle in ***Mburu Kinyua v. Gachini Titi*** [1978] KLR 69, I do hold that there has been no *new situation or information which can properly be the subject of the prayer in the instant application ; and there being no new situation as a basis for the "repeat application,"* I must hold the same to be *res judicat*a and cannot lie.

Therefore, I uphold the Notice of Preliminary Objection filed by the first Defendant on 10th November, 2004 and dismiss the Plaintiff's application with costs in any event.

DATED and DELIVERED at Nairobi this 4th day of February, 2005.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Mwangi

For the Plaintiff/Applicant: Mr. Kilukumi, instructed by M/s. Kilukumi & Co.

Advocates

For the 1st Defendant/Respondent: Mr. Nyaga, instructed by M/s. Njeru, Nyaga & Co.

Advocates

For the 2nd Defendant/Respondent: Mr. Guseyo, instructed by M/s. Kenta Moitalel &

Co. Advocates

3rd Defendant/Respondent absent and unrepresented.