



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**Civil Case 1231 of 2002**

**NAIROBI CITY COUNCIL ..... PLAINTIFF**

**VERSUS**

**THE COMMISSIONER OF LANDS .....1ST DEFENDANT**

**KENYA POWER & LIGHTING CO. LIMITED ..... 2ND DEFENDANT**

**THE REGISTRAR OF TITLES ..... 3RD  
DEFENDANT**

**RULING**

By its application of the 21.4.2004 the 2nd Defendant seeks an order that the Plaintiff's suit be struck out with costs to the 2nd Defendant.

In this suit the Plaintiff claims that the 1st Defendant has irregularly and unlawfully excised a portion of the suit premises and allocated the same to the 2nd Defendant.

It seeks inter alia the following prayers: -

- (a) A declaration that on the construction of the said agreements and in the events which have happened, the Plaintiff to occupy and remain in possession of the said plot L.R.209/11590;
- (b) A declaration that the purported reallocation of the said plot to the 2nd Defendant is fraudulent, illegal and therefore null and void;
- (c) An injunction to restrain the Defendants by themselves, their agents servants or otherwise howsoever from evicting, barring or in any other manner, interfering with the Plaintiff's quite occupation of the said plot;
- (d) Costs of this suit.

Mr. Khawaja for the Applicant relied on the contents of a Supporting Affidavit in support of the Application herein.

The Application is brought under O.6 rule 13 1(a) and (b). In so far as O.6 rule 13 1(a) is concerned no evidence can be brought. I therefore disallow the Application on this ground. The Applicant also relied on O.6 Rule 13 1(d) namely that the suit is so far as the 2nd Defendant is concerned an abuse of the process of the court.

It was Mr. Khawaja's contention that the matters in dispute in this suit are res judicata having been decided on HCCC No.892 of 1993 and 1887 of 1994 which were consolidated and if not substantially an issue in this suit might or ought to have been.

Mr. Khawaja in his submission relied on Mulla on the code of Civil Procedure 11 Edition Vol.1 and a passage on page 114 where it is stated: -

"The plea of res judicata applies, except in special cases, not only to points on which the Court was actually required by the parties to form an opinion and to pronounce judgment, but to every point which properly belonged to the subject of the litigation and which the parties exercising reasonable diligence might have brought forward at the time. The Principle underlying Explanation IV is that res-judicata is not confined to issues which the court actually asked to decide but covers issues or facts which are so clearly part of the subject- matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceedings to be started in respect of them."

Also a passage on page 118 under the Raboric test: -

"The question whether a matter might have been made a ground of attack or defence in the former suit rarely presents any difficulty. Whether it ought to have been made a ground of attack or defence depends on the facts of each case. As a general rule, every ground of attack with reference to the title sued on must be pleaded if necessary in the alternative (f); for the Plaintiff will not be allowed to make out a fresh case afterwards. Thus, if a Plaintiff sues for possession on the ground of owner"

***Also on Ahmed Hasson Zaidi versus Faud Hasein Holmeidan 1960 E.A. page 92.***

The pleadings in those suits were exhibited to the supporting affidavit. The parties to this suit included the present Plaintiff and 2nd Defendant and another party called Njilux Motors Limited (The Company).

The issues were, inter alia, did the Plaintiff herein grant a lease to the Company, a lease in respect of the premises in respect of which the 2nd Defendant has a title known as L.R. NO.209/11590 (The Property).

In his Judgment in that suit Mr. Justice Mboghali Msagha held that the 2nd Defendant had an indefeasible title to the property. The matter went on appeal and the Learned Court of Appeal dismissed the same holding that the 2nd Defendant had an indefeasible title to the property.

It is clear that the issues in respect of which the declaration sought and set out above are concerned have been determined and as such this court would not grant those declarations in this suit.

In reply, Mr. Mugai firstly submitted the application was incompetent, as the Application should have been made by way of Chamber Summons, as this is the Procedure both in O.VI and O.VII.

That in those suits the parties were different as well as the issues. He relied on the cases of Karsan Versus Bhogal 1974 E.A. L.R page 74 in which it was held in holding 1 -

"Matter in issues" in section 6 of the Civil Procedure Ordinance does not mean any matter in issue in the suit, but has reference to the entire subject matter in controversy; it is not enough that one or some issue are in common. The subject matter in the subsequent suit must be covered by the previous suit, not vice versa"

And D.T. Dobie & Co., Kenya Limited Versus Muchina & Another C.A No.37 of 1978 and the Judgment of Madan JA at page 9 where he stated: -

" No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and

obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it”

Under Order 50 Rule 8 a court can transfer any matter brought in open court into chambers. Although this Application should have been brought by way of Chamber Summons the matter was heard in chambers as a Chamber summons.

Section 7 of the Civil Procedure Act refers to matters directly and substantially in issues in a former suit and between the same parties or between parties under whom they or any part of their claim.

In this suit the parties include Nairobi City Council and the Kenya Power and Lighting Company Limited. These two were parties to the HCCC No.1887 of 1994 and 892 of 1993. The Court of Appeal in C.A No.206 of 1998 upheld the Judgment of Mr. Justice Mbogholi Magha and Mr. Justice Tunoi of the Appeal at page 2 of his Judgment encapsulated the findings of Judges of Court of Appeal in the following words: -

“As of now, therefore, KPLC has title. The appellant does not. The City Council of Nairobi does not complain that the Commissioner of Lands unlawfully deprived it of its land. It does not challenge the new Grant. Section 23 (1) of the Registration of Titles Act gives KPLC an absolute and indefeasible title to the suits land. Its title under the present circumstances takes precedence over all other alleged equitable or any other rights the appellant may possess over it.”

That decision effectively determined the issues raised in this case and I am therefore of the view that the matters raised in this suit are res judicata

In the result I allow this application and strike out the plaint herein against the 2nd

Defendant with costs to the 2nd Defendant including the costs of this application.

Dated and delivered at Nairobi this 12th day of July,2005

**P.J. RANSLEY**

**JUDGE**