**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO 255 OF 2018**

**(FORMERLY CIVIL SUIT NO. 83 OF 2009)**

**GAMI QUARRIES LIMITED.....1ST PLAINTIFF**

**RAMJI DHANJI GAMI.....2ND PLAINTIFF**

**-VS-**

**MUSA FAKIR MOHAMED.....1ST DEFENDANT**

**SALHAN RAHEMTULLA.....2ND DEFNENDANT**

**SAADA HYDER SALIM.....3RD DEFENDANT**

**AZIZA HYDER SALIM.....4TH DEFENDANT**

**RULING**

1. The application before me for determination is the Notice of Motion dated 23rd September, 2020 by the plaintiff seeking the following orders:

> **1. Spent**
>
> **2. Spent**
>
> **3. That the defendants herein, and in particular the fourth defendant and Hilmy Hyder Salim, be restrained whether by themselves, their servants, agents, employees or auctioneers (including Murphy Auctioneers) from continuing with or pursuing the wrongful and illegal purported distress levied on the 10th September, 2020 (or from levying any further distress in the future) and/or from interfering with the plaintiff's quiet possession of the suit premises situate on PLOT NO. 10947 SECTION I MN pending the hearing and determination of this suit.**
>
> **4. That Hilmy Hyder Salim be joined as the fifth defendant herein;**
>
> **5. That directions be given for urgent and expeditious hearing and disposal of this application;**
>
> **6. That the costs of this application be awarded to the plaintiff.**

2. The application has been brought pursuant to the provisions of Section 1A, 1B, 3A & 63 of the Civil Procedure Act, Order 40 Rules 1 & 2 of the Civil Procedure Rules and is supported by the affidavit sworn by Manoj Gami and is premised on the following grounds:

> **a. By its ruling dated 17th September, 2009, this Honourable Court restrained the defendants by way of an interlocutory injunction from continuing or pursuing the illegal and unlawful distress levied on 12th March 2009 and from interfering with the plaintiffs quiet possession of the property known as PLOT NO. 10947 SECTION 1 MN pending the hearing and determination of this suit;**

**b. This Honourable Court made a finding at the interlocutory stage that the defendants were using irregular means to assert their alleged and perceived claim over the property in respect of which there was also litigation before the Chief Magistrate's Court in Civil Case No. 1993 of 2004 where the defendants had raised a counterclaim seeking vacant possession and mesne profits to which the plaintiffs herein had raised the defence of limitation and that they were entitled to adverse possession of the property.**

**c. Both these suits are pending determination before the court and were delayed on account of the defendants' advocates withdrawing from acting in the matter;**

**d. The fourth defendant together with another individual, Hilmy Hyder Salim, have now proceeded to purport to levy distress on account of alleged rent claimed for Kshs.3,060,000.00 purportedly from August 2014;**

**e. The plaintiffs have not received any notification about this nor previous demands for this;**

**f. The fourth defendant herein, Aziza Hyder Salim is certainly conducting herself in breach of the order of this Honourable Court, referred to hereinabove and in a contemptuous manner;**

**g. There is no question of rent or loss of rent being incurred by the defendants herein as purportedly alleged given the prima facie findings made by this Honourable Court in its ruling delivered herein on the 17th September, 2009 referred to hereinabove.**

**h. The fourth defendant as well as the said Hilmy Hyder Salim are abusing the process of law in subverting the course of justice with the specific intent of wrongfully and illegally purporting to levy further distress when the question of whether they are entitled to do so is pending determination before this Honourable Court and particularly when the plaintiffs are entitled to adverse possession of the property in question as well as the question of limitation which has already been raised in the pleadings both in this case as well as before the Chief Magistrate' Court in Chief Magistrate's Court Civil Case No. 1883 of 2004. Clearly, they are attempting to use irregular means to achieve their purported claim over the subject property;**

**i. The plaintiffs have never had any landlord–tenant relationship with the defendants nor with Hilmy Hyder Salim and the purported levy of distress is unlawful and irregular. Indeed, this Honourable Court in is ruling referred to above accepted this fact on a prima facie basis and this is binding upon the defendants herein as well as on the said Hilmy Hyder Salim unless otherwise set aside;**

**j. The fourth defendant and the said Hilmy Hyder Salim are acting in bad faith and with complete lack of candour and in a contumelious manner without any regard for the process of law or the orders of this Honourable Court; and**

**k. Unless this Honourable Court further restrains the pursuit of the illegal and unlawful distress levied on the 10th September, 2020, the plaintiffs stand to be affected adversely and suffer irreparable loss and damage to their business and, in the case of the second defendant, to his residential premises which he has constructed on the suit property and lived thereon for over 25 years now.**

3. The applicants have annexed a copy of the ruling dated 17th September, 2009, and the order issued on 12th October, 2009 and a copy of the letter of instructions and proclamation.

4. In opposing the application, the defendants filed a replying affidavit sworn by Aziza Hyder Salim, the 4th defendant on 9th October, 2020. It is the defendant's contention that the orders issued via the ruling dated 17th September, 2009 expired one year thereafter by operation of the law. They aver that there are no findings as to any irregularities on the part of the defendants and that it is clear that the plaintiffs have continued to occupy the suit property to the detriment and exclusion of the defendants hence the plaintiffs are obligated to pay rent to the defendants. A copy of the certificate of title has been annexed. That the defendants have been extremely irregular in the payment of rent despite various demands for payment. It is deponed inter alia that this has led to the arrears accumulating to a colossal amount which entitles the defendants to exercise their primary remedy of levying distress for recovery of rent arrears. The defendants have annexed copies of text messages and mpesa statements. They deny breaching any orders of the court, stating that Hilmy Hyder Salim is the registered proprietor and landlord of the suit property herein. The defendants deny attempting to abuse the court process and accuse the plaintiffs for abusing the court orders issued 11 years ago. They state that the raising of adverse possession as a defence cannot enable any court of law to grant orders of adverse possession or to assume that a case of adverse possession arises. The defendants therefore contend that the distress for rent is legal because the plaintiffs have failed/refused and/or neglected to pay rent for the suit property. That the plaintiffs are either tenants of the suit property or they are trespassers.

5. Directions were given for the application to be canvassed by way of written submissions. Both the plaintiffs and the defendants filed their submissions on 15th December, 2020. The plaintiffs submitted that they have met the test in **Giella –v- Cassman Brown & CO. Ltd (1973) EA 358** and stated that they have established a prima facie case with a probability of success and that they stand to suffer irreparable damage. That pursuant to an application brought before this court, the court on 17th September, 2009 restrained the defendants by way of an interlocutory injunction from continuing or pursuing the illegal and unlawful distress levied on 12th March 2009 and from interfering with the plaintiffs quiet possession of the suit property. That in complete disregard of this court's orders, the defendants proceeded to unlawfully levy distress on 10th September, 2020 yet the interim orders had never been set aside and continue to be in place to date. They deny that they are abusing the court process. The plaintiffs submitted that they have lived on the suit premises for over 24 years and have permanent residential home and carry on business on the suit property and therefore if distress for rent is allowed to proceed, their lives and means of livelihood will be disrupted.

6. On their part the defendants submitted that the orders of injunction restraining the defends from levying distress via a ruling dated 17th September, 2009 have lapsed by operation of the law by dint of Order 40 Rule 6 of the Civil Procedure Rules. That the orders issued on 17th September, 2009 expired one year thereafter, and the plaintiffs therefore cannot rely on the said orders some eleven 11 years later. The defendants submit that there has been no attempt by the plaintiffs to have the suit herein heard and determined to conclusion and only seek to rely on orders issued 11 years ago as the same are to their advantage and to the disadvantage of the defendants. That the court never ruled that the plaintiffs were not required to pay rent due to their tenure of the subject parcel of land which belongs to the defendant. The defendant submitted that the plaintiffs continued occupation of the suit property is to the detriment and exclusion of the defendants. That the plaintiffs are therefore obligated to pay rent to the defendants and that if the plaintiffs claim otherwise, that means they are trespassers on the land who are not entitled to the court's protection. That the plaintiffs' action in delayed or irregular payments of rent have persisted despite various demands for payment as and when they fall due and this has led to the arrears accumulating to a colossal amount which entitled the defendants to exercise their primary remedy of levying distress for recovery of rent arrears. The defendants submitted that the plaintiffs are estopped from denying that the defendants are entitled to receive rent while they were remitting rent as shown in the annextures to the affidavit in support and against the application. That the plaintiffs claim for adverse possession is not automatic and has to be proven before a court of law. That so far no suit has been filed by the plaintiffs to claim for orders of adverse possession. That even if such a suit was filed, the plaintiffs are aware that no court can grant them orders for adverse possession since they have occupied the suit property with the authority, permission and consent of the defendants as tenants and have been paying rent, although irregularly. It is the defendants' submission that the plaintiffs have not shown any prima facie case with a probability of success, and have not shown what irreparable injuries, if any, which cannot be compensated by way of damages. That even the balance of convenience tilts in favour of the defendants who are the registered proprietors of the subject suit property and who are greatly prejudiced as they are neither receiving rent nor enjoying the tenure and utility of their property. The defendants further submitted that the plaintiffs are abusing the court process by abusing the orders issued 11 years ago, which orders the defendants submit have lapsed, in order to pay rent. That the plaintiffs are well aware that they are not the owners of the suit property nor are they landlords of the same. That the distress levied by the defendants is legal because the plaintiffs have failed/refused and/or neglected to pay rent for the suit property and have also failed to show any evidence that would exclude them from the duty and responsibility of paying rent to the defendants. The defendants urged the court to dismiss the application with costs.

7. I have considered the application and the submissions made. In my view, the issues that arise for determination are: whether the application herein is res judicata; whether the orders of injunction issued on 17th September, 2009 automatically lapsed after twelve months by operation of law; and whether the applicants should be granted the orders sought or not.

8. In this case, it is not in dispute that there was a similar application for interlocutory injunction made by the plaintiffs dated 24th March 2009. The said application was heard by the court and in the ruling dated 17th September, 2009, the court Azangalala J. (as he then was) allowed the application for injunction restraining the defendants from continuing with or pursuing the distress levied on 12th March 2009 (or from levying any further or other distress in the matter and/or from interfering with the plaintiffs quiet possession of the suit premises pending the hearing and determination of this suit. In the present application, the plaintiffs are also seeking to restrain the defendants from continuing with or pursuing distress levied on 10th September, 2020 or from levying any further distress in the future or from interfering with the plaintiffs quiet possession of the suit premises pending hearing and determination of the application inter-partes and pending hearing and determination of this suit.

9. Section 7 of the Civil Procedure Act provides as follows:

> **7. No court shall try any suit 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."**

10. Section 28 of the Environment and Land Court Act also bars the court from adjudicating over disputes between the same parties relating to the same issues previously and finally determined by any court of competent jurisdiction. The res judicata principle is meant to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent.

11. In the case of **John Florence Maritime Services Limited & Another –v- Cabinet Secretary** for **Transport and Infrastructure & 3 Others (2015)eKLR**, the Court of Appeal stated that the ingredients of the doctrine of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is a bar, secondly, that the former suit should be between the same parties, or parties under whom they or any of them claim, litigating under the same title, and lastly, that the court or tribunal before which the suit was litigated was competent and determined the suit finally. The Court of Appeal in that case stated as follows:

> **"The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon**."

12. There is no doubt that the principle of res judicata applies to applications with the same force whether the application be final or interlocutory. For me to determine if the current application is res judicata, the only three questions that I have to ask myself are; firstly whether the issues which were before this court in the application dated 24th March, 2009 are the same as those now raised in the present application; secondly, whether there is a final determination on those issues by the previous decision; and thirdly whether the parties are the same in all these proceedings.

13. I have perused the application dated 24th March 2009 and the subsequent ruling dated 17th September, 2009. There is no dispute that the parties are the same in all these proceedings, save that the plaintiffs want to have another defendant added in the suit. The subject matter in

the earlier application is the application for injunction to restrain the defendants from levying distress and interfering with the plaintiffs' possession of the suit premises situate on PLOT. NO. 10947 SECTION I MN pending the hearing and determination of this suit. The subject matter in the present application is the same. The issues are also similar in all forms and the court in the earlier application determined them in the ruling dated 17th September, 2009. The statutory provision under Section 7 of the Civil Procedure Act as well as Section 28 of the Environment and Land Court Act are clear and bars a court from hearing a matter or issue if the same was substantially in issue in a former suit or application between the same parties, if the issue was determined in the former application after a hearing. The issue in dispute in the two applications is the same or substantially the same. In my view, the plaintiffs cannot escape from the doctrine of res judicata by trying to have another defendant added to the suit. In my view, this application is barred by the doctrine of res judicata. By filing a fresh application seeking similar order as those earlier determined by a court of competent jurisdiction, the plaintiffs are certainly abusing the court process. Even the prayer for joinder of Hilmy Hyder Salim as 5th defendant has been made very late in the day. In the affidavit of Ramji Dhanji Gami sworn on 24th March 2009, and filed on 25th March, 2009, the plaintiffs annexed thereto various documents, including certificate of title of the suit property showing that the said Hilmy Hyder Salim was one of registered proprietors of the suit property. It is therefore clear that the plaintiffs knew about the interest of the said Hilmy Hyder Salim in the property and the suit way back in March 2009. The plaintiffs did not make an application to join the said person for the last eleven years. In the circumstances, it is my view that the application to enjoin the intended defendant is an afterthought and meant to further delay the finalization of this very old matter. By reason of the foregoing, I find that the Notice of Motion dated 23rd September, 2020 is devoid of merit and the same must fail.

14. The other issue for determination is whether the orders of injunction issue don 17th September, 2009 automatically lapsed after twelve months by operation of law. Under Order 40 Rule 6 and 7 of the Civil Procedure Rules 2010, it is provided:

> **"6. Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.**
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> **7. Any order for injunction may be discharged, or varied, or set aside by court on application made thereto by any party dissatisfied with such order.**

15. In the case of **Ochola Kamili Holdings Ltd-v- Guardian Bank Ltd (2018)eKLR,** Makau J stated as follows:

> **"The court is alive to the fact that an interlocutory injunction, being an equitable remedy, would be discharged upon being shown the person's conduct with respect to the matter, pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter and especially where a party upon getting the injunction orders sits on the matter and uses the orders to the prejudice of the opponent. The orders of injunction are mainly intended to preserve the subject matter with a view to have expeditious determination but not to oppress another party nor should an injunction be used to economically oppress the other party or to deny justified repayment of outstanding loan. That once such a post-injunction behavior is exposed it would in my view be a ground to discharge an injunction because the order obtained would be an abuse of the purpose for which the injunction was granted. No court would allow its orders to be used to defeat the ends of justice. Further, by operation of law the order obtained by the plaintiff has since lapsed as 12 months has lapsed since its issuance and no extension has been sought."**

16. The importance of Order 40 Rule 6 of the Civil Procedure Rules in furthering the overriding objective was also underscored by Gikonyo J in **David Wambua Ngii –v- Abed Silas Alembi & 6 Other (2014) eKLR**:

> **"It is important to first deal with the scope and purpose of Order 40 Rule 6 of the Civil Procedure Rules on lapse of an injunction. Order 40 Rule 6 of the Civil Procedure Rule could be said to be the enabler of the overriding objective in real practical sense. The rule is intended to prevent a situation where an unscrupulous applicant goes to slumber on the suit after obtaining an injunction. I say this because it is not uncommon for a party who is enjoying an injunction to temporize in a case for as long as possible without making serious efforts to conclude it. That is the mischief it was intended to cure**."

17. The Court of Appeal in the case **of Nguruman Limited –v- Jan Bonde Nielsen & 2 Others (2014)eKLR** expressed itself as follows:

> "**Without going into the details we, with respect, agree with the submissions of all learned counsel that the object of introducing rule 6 aforesaid in the 2010 Rules was to deal with the mischief where a party at whose instance a temporary injunction is granted employs various machinations to delay the disposal of the suit. Rule 6 of Order 40 was therefore a necessary and reasonable safeguard against such machinations. It is a condition that many jurisdictions have imposed in dealing with abuse of injunctive orders**."

18. In the case of **Barclays Bank of Kenya Limited –v- Henry Ndungu Kinuthia & Another (2018) eKLR**, the Court of Appeal stated:

> **"(17). A plain reading of Order 40 Rule 6 shows that the Rule is couched in mandatory terms, and that the only situation in which an interlocutory injunction will not automatically lapse after 12 months by operation of the law is where the court has given a sufficient reason why the interlocutory injunction should not so lapse. Therefore the question we address is whether the words "pending the hearing and determination of this suit" created a sufficient reason within the Rule so that the interlocutory injunction does not automatically lapse after 12 months.**
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> **(18). We have perused the ruling made by the High Court on 22nd February 2011. In the first place we note that the 1st respondent's notice of motion dated 26th August 2008 that was subject of that ruling was brought under Order 39 Rules 1, 3, 5 and 9. Rule 1 of that Order specifically gave the court power to:**

**"Grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.**

**(19). Under the 2010 edition of the Civil Procedure Rules, Order 39 Rule 1 became Order 40 Rule 1 in exactly the same terms but there was the introduction of Order 40 Rule 6 limiting the order of interlocutory injunction for a period of 12 months. Thus, the order granted by the court issuing interlocutory injunction "pending the hearing and determination of the suit" can only be read within the context of Order 40 Rule 1. In other words, the court was not addressing itself to Order 40 Rule 6 and providing sufficient reason for the order of injunction to remain in force for more than 12 months, but was merely issuing an order of temporary injunction to preserve the suit property during the pendency of the suit.**

**(20). The order made by the court on 22nd February, 2011 remained subject to Order 40 Rule 6 that required that such an interlocutory order remain in force for a period of 12 months only, but subject to the court having the power to extend the interlocutory order beyond the 12 months, if there is sufficient reason for it to do so. In our view, such as extension must be addressed by the court and justified at the opportune time.**

**(21). We take note of the fact that in applying the Civil Procedure Rules the High Court was obligated under Section 1A and 1B of the Civil Procedure Act, to be guided by and to further the overriding objective of the Civil Procedure Act and Rules which includes to facilitate the just determination of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties….**

**(24). As we have demonstrated the words "pending the hearing and determination of this suit" could not have constituted sufficient reason to justify the extension of the interlocutory injunction beyond the period of 12 months. This is clearly a situation where the 1st respondent was content to rest on his laurels for more than three years, and made no attempt to have the injunction extended. Nor did he appear anxious to have the substantive suit expeditiously disposed of."**

19. In this case, the order of interlocutory injunction was made on 17th September, 2009, a period of about 11 years ago. Although the order was to remain in force "pending the hearing and determination of this suit", the Court of Appeal in the above cited case was very clear the words "pending the hearing and determination of this suit" could not have constituted sufficient reason to justify the extension of the interlocutory injunction beyond the period of 12 months. And to borrow the words used by the Court of Appeal in the above case, this is clearly a situation where the plaintiffs were content to rest on their laurels for more than eleven years, and made no attempt to have the injunction extended. Nor did they appear anxious to have the substantive suit expeditiously disposed of. In this case, it is quite clear that the plaintiffs upon getting the injunction orders took no action to prosecute the suit and used the orders to the prejudice of the defendants. The orders of injunction were mainly intended to preserve the subject matter with a view to have expeditious determination of the suit, but not to oppress the other party. Once such a post-injunction conduct is exposed it would, in my view, be ground to discharge an injunction because the order obtained would be an abuse of the purpose for which the injunction was granted. As stated in the cases cited above, no court would allow its orders to be used to defeat the ends of justice. By filing the present application, it can be presumed that the plaintiffs were admitting that indeed the orders issued on 17th September, 2009 have lapsed, otherwise there was no reason to file the application which seeks similar orders when there were orders in force. It is therefore my conclusion that the orders of injunction made on 17th September, 2009 have lapsed by operation of the law.

20. The upshot is that the notice of motion dated 23rd September, 2020 lacks merit and is dismissed with costs.

21. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22ND DAY OF MARCH, 2021**

**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**