MJK v Auctioneers & another (Civil Appeal E022 of 2023)
[2023] KEHC 3633 (KLR) (Family) (24 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3633 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL APPEAL E022 OF 2023

MA ODERO, J

APRIL 24, 2023

BETWEEN

MJK ..... APPELLANT

AND

JOHN MUTWIRI MBIJIWE T/A BEALINE AUCTIONEERS . 1ST RESPONDENT

FML ..... 2ND RESPONDENT

RULING

1. Before this court is the notice of preliminary objection dated March 21, 2023filed by the 2nd respondent FML. The matter was canvassed by way of written submissions. The respondent filed the written submissions dated March 23, 2023 whilst the applicant relied upon her written submission dated March 27, 2023.

Background

2. The applicant herein MJK filed the Notice of Motion Application dated March 14, 2023 seeking the following orders:-

> " 1. Spent.
>
> 2. Pending the hearing and determination of the instant application, the Honourable court be pleased to issue an order of stay of execution of the orders issued by the Subordinate Court on March 13, 2023.
>
> 3. The honourable court be pleased to issue an order of stay of execution of the orders issued by the subordinate court on March 13, 2023 pending the hearing and determination of the Appeal filed herewith.

4. Any such order/orders that this Honourable court may deem fit to grant."

3. In response to this application the 2nd respondent filed the notice of preliminary objection dated March 21, 2023 which was premised upon the following grounds:-

"(1) The Application is *res judicata* to the extent that:

"(a) the Court of Appeal (Okwengu, Jamilla and Mbogholi JJA.) resolved the issue of eviction in favour of the 2nd respondent vide a Ruling delivered on August 19, 2022 (in Civil Appeal (Application) No. E068 of 2022: MJK v FML);

(b) this honourable court (Maureen Odero J.) similarly resolved the issue of eviction infavour of the 2nd respondent vide a ruling delivered on January 20, 2023 (in Civil Appeal (Application) No. E096 of 2022: MJK v FML: (c.f. paragrapha 26 of the High Court's Ruling);

(c) the interlocutory orders that previously granted the appellant/ applicantpossession and user of the suit property were predicated on the outcome of Milimani Commercial Courts Divorce Cause No. 272 of 2019 ('the divorce cause") on the existence or nonexistence of a marriage between the applicant and the 2nd respondent;

(d) the trial court then (Nyaga CM) now Justice of the High Court delivered a judgement in the Divorce Cause on September 27, 2022 holding that there was no marriage between the applicant and the 2nd respondent;

(e) this honourable court (Maureen Odero J.) refused to stay the final judgement of the Divorce Cause on January 20, 2023 vide a Ruling alluded to in subparagraph (b) above;

(f) The appellant/applicant's unsuccessful applications were predicated on the fact that the interlocutory orders that previously granted the applicant possession and user of the property automatically lapsed/abated upon delivery of the Judgement in the Divorce Cause to the effect that there was no marriage between the applicant and 2nd respondent (c.f. paragraph 17 of the High Court's Ruling alluded to in subparagraph (b) above;

(2) Given the matters raised in paragraph (1) subparagraph (a) above and the hierarchical nature of Kenya's judicial system, this honourable court lacks jurisdiction to entertain the Application to the extent that the Court of Appeal (Okwengu, Jamilla and Mbogholi JJA.) resolved the issue of eviction in favour of the 2nd respondent.

(3) The applicant is an abuse of the process of this honourable court to the extent that:

(a) it seeks to secure the applicant's continued enjoyment-for the sixth year- of interlocutory orders relating to the respondent's private property despite the outcome of Milimani Commercial Courts Divorce Cause No. 272 of 2019 ("the divorce cause") yet the trial court found that there is no marriage between the applicant and the 2nd respondent;

(b) as the record confirms ex-facie the Appellant has unsuccessfully filed multiple suits in various courts seeking the same similar relief(s) against the 2nd respondent. Litigation must come to an end.

(c) the applicant's appeal is not arguable to the extent that the interlocutory orders that the Application seeks to extend under the guise of pursuing the appeal were predicated on the possibility of the existence of a valid marriage between her and the 2nd respondent.

(4) the applicant's deliberate dilatory tactics of unfairly prolonging her enjoyment of interlocutory orders militate against the exercise of this honourable court's discretion in favour of the applicant."

Analysis and Determination

4. I have carefully considered the Preliminary Objection filed in the court as well as the written submissions filed by both parties.

5. The definition of what constitutes a Preliminary Objection was provided in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd – vs – West End Distributors Ltd* [1969] E.A 696 where it was held as follows:-

> "So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a Preliminary point may dispose of the suit".

6. Similarly in the case of *Oraro v Mbaja* [2005] KLR Hon Justice Ojwang (as he then was) stated as follow:-

> "A preliminary objection is in nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop. The principle is abundantly clear. The "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence." [own emphasis]

7. The issues which have been raised by this Preliminary Objection being issues of jurisdiction and res judicata are in my view issues which upon determination may dispose of the application. I therefore find that the preliminary objection dated September 17, 2020 raises pure points of law and is a proper preliminary objection.

(I) Jurisdiction

8. Jurisdiction it is said is everything. Without the requisite jurisdiction a court must immediately down its tools. In The *Motor Vessel "lillian S" v Valtex Motor Oil (k) Ltd* (1989) eKLR the court held that :-

> " Jurisdiction is everything, without it the court has no power to make one more step. A court lays down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction"

9. The respondent states that this court has no jurisdiction to entertain the application dated March 14, 2023 filed by the applicant since the High Court has already made a determination on the issue of eviction.

10. The applicant has filed numerous applications/suits in respect of the property known as [Particulars Withheld] Villas House No. xx erected on L.R. No. xxxx/xxxx (I.R. NO.xxxxx) (hereinafter 'the suit property'). In those suits/applications the applicant sought to restrain the 2nd respondent from evicting her from the suit property. Various courts dismissed this prayer.

11. On March 13, 2023 Hon. W.K. Micheni Chief Magistrate made orders directing the OCS Runda Police Station to supervise the eviction of the applicant from the suit property. The applicant moved to this court seeking to stay those orders of eviction issued on March 13, 2023. Therefore what is now before this court is an application seeking to stay execution of new orders of eviction issued by the lower court.

12. In light of the above facts I find that this court has requisite jurisdiction to hear and determine the matter.

(II) **Res Judicata**

13. Therespondent has submitted that the matters being raised by the applicant in this Notice of Motion dated March 14, 2022 are 'Res Judicata'. That the applicant has challenged the issue of her eviction before several courts and this the same issue cannot be raised again in this court.

14. The principle ofres judicata is provided for by section 7 of the *Civil Procedure Act*. cap Laws of Kenya as follows:-

> " 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."

15. *Black Law Dictionary* 10th Edition defines res judicata in the following terms:-

> " An issue that has been definitely settled by judicial decision.... the three essentials are:-

i. an earlier decision on the issue;

ii. a final judgement on the merits; and

iii. the involvement of the same parties, or parties in privity with the original parties;

16. The Court of Appeal in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR stated as follows:-

> "That rule or doctrine of *res judicata* serves the salutary aim of bring finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice". [own emphasis]

17. Therefore party seeking to rely on the doctrine of *res judicata* to bar a suit from being heard must prove each of the following elements:-

    a. The suit or issue raised was directly and substantially in issue in the former suit;

    b. The former suit was between the same parties or between the same parties under whom they or any of them claim;

    c. The parties were litigating under the same title in the former; and

    d. The court that formerly heard and determined the issue was competent to try and the subsequent suit or the suit in which the issue is raised.

18. The purpose of the doctrine of res judicata is to avoid a scenario where the courts are engaged in endless rounds of litigation over the same issue. A litigant may not commence more than one action in respect of the same or a substantially similar cause of action so as to avoid a multiplicity of suits.

19. This whole circus began when the lower court declared that there existed no marriage between the applicant and the 2nd respondent. The applicant lodged an appeal against that decision and also sought orders to stay execution of the judgement of the lower court citing an apprehension that the 2nd respondent would move to evict her from the suit property. That application for stay was heard by this court which in a Ruling delivered on January 20, 2023 declined to grant the stay orders sought.

20. The applicant has also filed an appeal against decision of the ELC Court in Nairobi ELC Case No. 6393 of 2021. The applicant again sought to stay the decision of the ELC Court fearing that she would be evicted from the suit property. She also sought an injunction to restrain the respondent from evicting her from the property in question.

21. That matter was heard by the Court Appeal in Civil Application No. 068 of 2022. The Honourable Judges of Appeal dismissed the Application and declined to issue orders restraining the respondent from evicting the applicant.

22. Yet again theapplicant is before this court seeking the very same orders i.e. orders to restrain the 2nd respondent from evicting her. It is enough! Litigation it is said must come to an end. The applicant is becoming a vexatious litigant. Her numerous applications over the same issue amounts to an abuse of the court process.

23. I find that the issues raised in the Notice of Motion Application dated March 14, 2023have been litigated to death. The applicant has sought similar orders in various different courts with no success.

She cannot bring up the same issue again. In the case of *Njangu -vs- Wambugu and another* Nairobi No. 2340 of 1991 (Unreported) Hon. Justice Richard Kuloba (as he then was) succintly put it as follows:-

> " If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*..."

24. Similarly *Uhuru Highway Development Ltd v Central Bank of kenya, Exchange Bank (involuntary Liquidation & Kamlesh & Mansukhlal Pattni* [1995] eKLR The Court of Appeal stated as follows:-

> "...This shows only one intention on the part of the legislature in India and our *Civil Procedure Act*. That is to say, there must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to application within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory application as much as there ought to be an end to litigation. It is this precise problem that Section 89 of our *Civil Procedure Act* caters for ..." [own emphasis]

25. Indeed no less than the Court of Appeal has rendered a decision dismissing a similar application. This court being inferior to the court of Appeal cannot purport to decide an issue upon which the superior court has already rendered a decision. I find that the matter is indeed *res judicata*.

26. Finally and in conclusion I find merit in the preliminary objection dated March 21, 2023. I Find that the application dated March 14, 2023is vexatious and amounts to clear abuse of court process. The same is hereby struck out. For avoidance of doubt the orders of status quo issue on March 22, 2023 are hereby set aside. Costs are awarded to the 2nd respondent.

Dated in Nairobi this 24th day of April, 2023.

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MAUREEN A. ODERO

JUDGE