



**REPUBLIC OF KENYA**

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

**COMMERCIAL & ADMIRALTY DIVISION**

**HCCC NO. 402 OF 2016**

**KAMU & WANG INDUSTRIES LIMITED.....PLAINTIFF**

**VERSUS**

**JACKSON MUTUGI MWANGI.....1<sup>ST</sup> DEFENDANT**

**EQUITY BANK LIMITED.....2<sup>ND</sup> DEFENDANT**

1. This Court is asked to determine the Notice of Motion dated 19<sup>th</sup> July 2017 for the following two orders:-

3. THAT pending the hearing and determination of this suit interparties a temporary injunction do issue restraining the Defendants whether by themselves, their agents and or servants from selling either by public auction or private treaty, dealing with, interfering with transferring, taking over, trespassing, alienating and or disposing of all that property known as L.R No. 9042/587 (I.R.72111) and/or in any way from interfering with the Plaintiff/Tenant's quiet enjoyment of the property herein.

4. THAT the Honorable Court does see fit to review, revoke and or set aside the Ruling of 22<sup>nd</sup> July, 2017.

2. I am afraid the Motion runs into two insurmountable difficulties.

3. The Plaintiff had made a similar application for injunction on 19<sup>th</sup> July 2016 and upon which this Court rendered itself on 22<sup>nd</sup> June 2017. The issues raised herein are substantially the same as those raised in the application of 19<sup>th</sup> May 2016. Any new issues are simply to revamp the position of Plaintiff but would nevertheless be *res judicata*.

4. Section 7 of The Civil Procedure Act, which also applies to applications, codifies *res judicata* 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”.

Explanation 4 is relevant to the matter at hand and reads:-

“(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit”.

5. There is no explanation why any new matters or evidence that are revealed in the current application could not be raised on the application of 19<sup>th</sup> July 2016. If explanation 4 (above) of section 7 is not observed then parties could litigate in installments. There would be no end to litigation. This would be inimical to public policy.

6. Granted that the Plaintiff may be aggrieved by this Court's decision of 22<sup>nd</sup> July 2017 but the solution is not to present a second application of like nature or to seek a review when the circumstances do not fit those contemplated by Order 45 of the Civil Procedure Rules on Review. The remedy available to the Plaintiff would be to appeal against the decision.

7. Then again there is some confusion apparent on the face of the Motion. The applicant invokes Order 42 Rule 6 of The Civil Procedure Rules which is on stay pending appeal. Yet in the body of the application the Plaintiff prays for a temporary injunction pending the hearing and determination of the suit. But the confusion may be overlooked because there is no contradiction in a Court which has declined to grant

an injunction pending trial granting an injunction pending the hearing of an Appeal from that decision (Madhupaper International Ltd vs. Kenr [1985] KLR 846). However in the matter before Court there is no evidence that the Plaintiff has filed an appeal against the Court's decision of 22<sup>nd</sup> July 2017. For purposes of an application of this nature an Appeal to the Court of Appeal is deemed as filed when a Notice of Appeal (under the Court of Appeal Rules) has been given. The Court does not have evidence of such Notice. For that reason I do not have a competent application for injunction pending Appeal.

8. The Notice of Motion dated 19<sup>th</sup> July 2017 is hereby dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 15<sup>th</sup> day of February, 2019.**

**F. TUIYOTT**

**JUDGE**

**Present:**

Wakhisi for Omari for Plaintiff

Wakhisi h/b Saluni for 1<sup>st</sup> Defendant

Mbugua for Wahora for 2<sup>nd</sup> Defendant

Nixon- Court Assistant