



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 287 OF 2016

DANIEL KIPCHIRCHIR KOMEN.....PLAINTIFF

VERSUS

ISAAC KIPKEMEI TERER.....1ST DEFENDANT

PAUL'S COOKIEMANS LTD.....2ND DEFENDANT

RULING

1. *Isaac Kipkemei Terer*, the 1st Decree Holder/Defendant, filed the notice of preliminary objection dated the 18th September, 2019 raising three (3) grounds to the application dated the 12th September, 2019 by Daniel Kipchirchir, the Judgment Debtor/Plaintiff. The grounds are;

“1. The application dated the 12th September, 2019 is res-judicata in view of the judgment debtor’s earlier application dated 19th November, 2018 raising the same issues and which was dismissed by operation of the court order given by Honourable Justice Ombwayo on 7th February, 2019.

2. The application is filed contrary to Section 7 of the Civil Procedure Act, 2010 and therefore the Honourable court lacks jurisdiction to grant the orders prayed for.

3. The application is bad in law, vexatious and an abuse of the court process.”

2. That by consent of Counsel for the three parties, the written submissions for the 1st Decree Holder/Defendant, Judgment Debtor/Plaintiff and 2nd Decree Holder/Defendant dated 1st October 2019, 2nd October, 2019 and 19th November, 2019 respectively were filed. It is the 1st Decree Holder’s case that the Judgment Debtor’s application dated the 12th September, 2019 is on all four similar to their earlier application dated the 19th November, 2018 that was dismissed by operation of the order of 7th February, 2019 and hence contravenes **Section 7 of the Civil Procedure Act**. The learned Counsel for the 1st Decree Holder cited the cases of *Mukisa Biscuits Manufacturing Company Ltd (1969) E. A. 696*, *Omondi Vs National Bank of Kenya & Others (2001) KLR 579*, *Uhuru Highway Development Ltd. Vs Central Bank of Kenya & 2 Others [1996] eKLR* and *Mburu Kinyua Vs Gachini Tuti (1978) KLR 69* in support of their submissions and prayed for their preliminary objection to be upheld and the Judgment Debtor’s application to be struck out. The learned Counsel for the 2nd Decree Holder’s submissions are also in support of the preliminary objection. The learned Counsel referred the court to the case of the *Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 Others, Nairobi Court of Appeal Civil Appeal No. 105 of 2017 [2017] eKLR*. The learned Counsel for the Judgment Debtor opposed the preliminary objection in their submissions. The Counsel referred to the cases of *Maithehe Malindi Enterprises Limited Vs Kaniki Karisa Kaniki & 2 Others – Mombasa Court of Appeal Civil Appeal No. 68 of 2016*, Paragraph 31, *Michael Bett Siror Vs Jackson Koech – Eldoret Court of Appeal Civil Appeal No. 53 of 2016*, paragraph 30, *Salama Beach Hotel Ltd & 3 Others Vs Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates – Mombasa Court of Appeal Civil Appeal No. 100 of 2017* at paragraph 36 and *M. W. K. Vs A. M. W. – Kiambu High Court Case No. 5 of 2016 (OS)* at paragraph 31 in support of their submissions that the application dated 19th November, 2018 was not, and has not been determined on its merit and the application dated 12th September, 2019 is not res-judicata as alleged and that the preliminary objection should be dismissed with costs.

3. The following are the issues for the court’s determinations;

(a) Whether the application dated the 19th November, 2018 was decided by the court and if so, whether the application dated the 12th September, 2019 is res-judicata and or bad in law, vexatious and an abuse of the court process.

(b) Who pays the costs?

4. The court has carefully considered the grounds on the preliminary objections which are primarily that of res-judicata and abuse of the court's process, the written submissions by the learned Counsel for three parties, the decided authorities cited therein and come to the following determinations:

(a) That from the submissions by all Counsel, there is no dispute that the applications by the Judgment Debtor dated the 19th November, 2018 and 12th September, 2019 raises similar issues and are the same in all material aspects. That the dispute is whether the application dated the 19th November, 2018 had been decided by the court on merit by the time that dated the 12th September, 2019 was filed.

(b) That the application dated the 19th November, 2018 came up in court on the same date when the firm of Migos Ogamba & Company Advocates were granted leave to come on record for the Judgment debtor/Applicant hence settling prayer 2 of the chamber summons. The court further directed that the application be served for inter-partes hearing on the 29th November, 2018. That on the 29th November, 2018, the court heard the three Counsel for the parties herein and among others granted stay of execution pending determination of the application. The court also gave directions on filing of submissions and fixed the highlighting on the 7th February, 2019. That on the 7th February 2019, the court after hearing the Counsel for the three parties ordered as follows:

“The applicant to file and serve submissions within 7 days, failure of which the application dated the 19th November, 2018 stands dismissed with costs. Ruling on 21st February, 2019. Interim orders extended until 21st February, 2019.”

The record shows that the Judgment debtor's/Applicant's submission was filed on the 15th February, 2019 which was outside the seven (7) days given on 7th February, 2019. That during the subsequent mention of 12th September, 2019, the court heard the three learned Counsel for the parties, and ordered as follows;

“The application stood dismissed on 7th February, 2019. For avoidance of doubt, the conservative orders went with the application.”

That this clearly shows that the application dated the 19th November, 2018 was not decided on merit but on the basis of failure to prosecute. The Court of Appeal's decision in *Michael Bett Siror Vs Jackson Koech* that dismissal of a suit for want of prosecution does not satisfy the requirements of **Section 7 of Civil Procedure Act** is binding on this court.

(c) That Judgment Debtor/Applicant then filed the chamber summons dated the 12th September, 2019 seeking the same prayers as were in their earlier application dated the 19th November, 2018 that dismissed with costs vide the order of 7th February, 2019. The application was certified urgent on the same date and fixed for hearing on the 19th September, 2019. That on that date, Counsel agreed that the preliminary objection filed by the 1st Defendant's/Decree Holder's Counsel, dated and filed on the 18th September, 2019 be heard and determined first.

(d) That further to the finding in (a) and (b) above and as the Defendants/Decree Holders had replied to the chamber summons dated the 19th November, 2018 and filed their written submissions, the court finds the filing of the subsequent chamber summons dated the 12th September, 2019 though not a contravention of **Section 7 of the Civil Procedure Act Chapter 21 of Laws of Kenya**, was an abuse of the court's process as the appropriate route was to seek for the order of 7th February, 2019 to either be set aside, reviewed or time for filing the submissions extended. That accordingly, the 1st Defendant's/Decree Holder's preliminary objection has merit on that ground and is hereby upheld.

5. That flowing from the foregoing, the court finds merit in the 1st Defendant's/Decree Holder's preliminary objection on the Judgment Debtor's/Applicant's chamber summons dated and filed on the 12th September, 2019 on the ground of abuse of court process. That the said chamber summons dated the 12th September, 2019 is hereby struck out with costs.

Orders accordingly.

Dated and delivered at Eldoret this 5th day of February, 2020.

S. M. KIBUNJA

JUDGE

Ruling read in open court in the presence of:

No appearance for Judgment Debtor/Plaintiff.

Tuitoek for 1st Decree Holder/Defendant.

No appearance for 2nd Decree Holder/Defendant.

Christine: Court Assistant