



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 308 OF 2006

MBIGI NJUGUNA & CO. ADVOCATES.....APPLICANT

-VERSUS-

THE TOWN CLERK OF NAIROBI.....RESPONDENT

AND

STANLEY T. MUGACHA.....INTERESTED PARTY

RULING

1) The subject matter of this ruling is the motion dated 13.9.2012 taken out by Stanley T. Mugacha t/a Galaxy Auctioneers, the Interested party herein. In the aforesaid motion, the Interested Party sought for following orders:-

1. That a determination be made on the fate of Motor Vehicle registration Number KAW 737Z Nissan Lorry which was sold to ne Francis Kairu Chege at a Public Auction held by the Interested Party on the 11th February 2011 but which the Respondent herein forcefully took away from Leakey's Storage yard on 12th February 2011.

2. THAT this court do make such order as it may deem appropriate, just and necessary to secure the interests of all persons concerned pursuant to section 34 of the Civil Procedure Act.

3. THAT the costs of this proceedings be provided for.

2) The motion is supported by an affidavit and a further affidavit sworn by the Interested Party. When served with the motion, the Town Clerk, City Council of Nairobi, the Respondent herein, filed the replying affidavit of Karis Iha to oppose the application. The Respondent further filed the Notice of Preliminary Objection dated 20.11.2012 to resist the motion. The firm of Mbigi Njuguna & Co. Advocates, the Plaintiff/ Respondent filed written submissions.

3) When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the preliminary objection heard first and disposed by written submissions. I have considered the grounds stated on the face of the Notice of Preliminary Objection and the rival written submissions.

4) It is the submission of the Respondent that the application dated 13th September 2012 is resjudicata hence it should be dismissed pursuant to the provisions of Section 7 of the Civil Procedure Act. The Respondent referred to the ruling delivered by Lady Justice Rawal (rtd) on 22.11.2011 which show that the parties to the dispute were the same as those obtaining in this matter i.e **Mbigi Njuguna & Co. Advocates – vs- The Town Clerk, City Council for Nairobi Misc. App. No. 308 of 2006.**

5) It was pointed out that the Respondent has demonstrated that the suit was and has always been between the same parties. It was also argued that the matter before this court is directly and substantially in issue in the subsequent suit. The Respondent stated that after the ruling was delivered on 22.11.2011, the Applicant purported to file a party and party Bill of Costs dated 29.5.2012 claiming for payment of kshs.598,063/=.

6) In the aforesaid ruling, the Respondent averred that the learned judge stated that the decree therein was fully satisfied and proceeded to set aside all the consequential actions taken by the Respondent and that the learned judge also made an order of restitution of Ksh.244,627/70. The plaintiff was of the same argument as that of the respondent that is to say that the Interested Party's application is resjudicata.

7) The interested party is of the submission that the application is not resjudicata since the same seeks for the return of the attached motor vehicle registration no. KAW 737Z Nissan Lorry to Francis Kairu Chege. It was pointed out that the aforesaid motor vehicle was forcefully taken away from Leakey's storage yard.

8) The Interested party argued that the court did not order for the release of the motor vehicle since it found the attachment to be lawful therefore this court is entitled to interrogate the issue by determining the motion dated 13.9.2012 on its merits. The Applicant further argued that the court has power to determine the application under Section 34 of the Civil procedure Act.

9) Having considered the rival submissions, I am convinced that the plea of resjudicata has not been properly founded. With respect, I agree with the submissions of the Interested Party that the motion before this court seeks to have the question as to what is to happen to the aforementioned motor vehicle which had been attached and sold to Francis Kairu Chege and later forcefully taken by the Respondent. That question was not answered by the ruling of Lady Justice Rawal delivered on 22.11.2011.

10) The other preliminary issue is the assertion that the suit is an abuse of the court process. It is the Respondent's submission that the Applicant has been engaging the Respondent in endless legal battles which have been settled by this court. The interested party pointed out that this ground is an issue which require the presentation and analysis of evidence to be settled hence it cannot qualify to be treated and or regarded as a preliminary objection.

11) With respect, I entirely agree with the submission of the Interested Party that the later ground which was set out as a preliminary objection does not qualify to be regarded as such. In other words it is not a pure point of law.

12) There is an argument that the Interested Party did not seek prior leave before being enjoined to this matter. The Interested Party submitted that the argument cannot stand because the Respondent acknowledges the fact that the Interested Party had formally sought for leave to be enjoined as an Interested Party to this suit vide the motion dated 15.2.2011. In the circumstances of this dispute, it would appear that such an issue may require some evidence to be adduced to establish the same. I must hasten to state that the issue is a point of law which must be established by considering the facts.

13) In the end, I find no merit in the Preliminary Objection. The same is dismissed with costs abiding the outcome of the motion. The motion dated 13.9.2012 should be determined on its merits.

Dated, Signed and Delivered at Nairobi this 5th day of July, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Applicants

..... for the Respondents