REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 131 OF 2002

NATIONAL HOUSING CORPORATION.....PLAINTIFF/RESPONDENT

VERSUS

LAWI KIPLAGAT.....DEFENDANT/APPLICANT

RULING

1. The Defendant herein has filed a notice of motion dated 30th April, 2018 under Articles 48 and 159 (1) & (2) of the Constitution of Kenya, 2010; Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, Cap. 21 Laws of Kenya; and Orders 10, Rule 11 and 51, Rule 1 of the Civil Procedure Rules, 2010. Furthermore, the Motion is supported by the grounds set out in the body thereof, the affidavit sworn by **Lawi Kiplagat** on 30th April, 2018 and the annextures thereto. The Applicant is seeking the following orders:-

i) Spent;

ii) Spent;

iii) **THAT** the judgment entered against the Defendant on 8th July, 2002 and all consequential orders be set aside.

iv) **THAT** the Defendant be granted leave to defend the main suit.

v) **THAT** the costs of the Application be provided for.

2. Lawi Kiplagat averred, inter alia, that he has a good defence that raises triable issues and is deserving of consideration on merit. Furthermore, he stated that his previous attempt to set aside the default judgment through a notice of motion dated 5th October, 2011 was unsuccessful since the court noted that his then advocates were not properly on record and that the application was filed without leave of court.

3. The deponent further stated that in its ruling of 21st November, 2011, in respect of the aforesaid application, the court both struck out and dismissed the application with costs, thereby creating confusion. In his view, the application having been struck out, it was no longer available for dismissal with costs and as such, the confusion resulting therefrom should lean in his favour by having the current application heard and determined on merit.

4. The deponent further claimed that the delay in bringing the present application resulted from his genuine belief that the matter was on course and maintained that the Plaintiff will suffer no prejudice in the event that the default judgment is set aside since it will have the opportunity of presenting its evidence and challenging that of the deponent. On the other hand, he contended that he will suffer grave prejudice and injustice of being condemned unheard should the default judgment remain in place and that he urges the court to consider his constitutional right to access justice and grant him his day in court.

5. In opposition to the present application, a Replying Affidavit was sworn by Kennedy K. Munala on 28th May, 2018. In essence, the deponent stated that the Plaintiff filed the main suit against the Defendant on 25th January, 2002 and thereafter duly served upon the said Defendant a copy of the filed Plaint together with Summons to enter appearance and that an Affidavit of Service was drawn and filed to that effect. The deponent in turn maintained that interlocutory judgment was entered against the Defendant on 8th July, 2002 for Kshs.18,883,261.90 and which amount the Defendant has neglected and/or refused to pay.

6. The deponent also averred that the decree was partially executed and the Plaintiff was able to recover Kshs.6,515,463 from the Defendant. He also acknowledged the fact that the Defendant had filed the application dated 5th October, 2011 but went ahead to add that contrary to the averments made by the Defendant, the application of 5th October, 2011 was dismissed on merit.

7. The deponent averred that the Defendant is deliberately causing a delay with the intention of deterring the Plaintiff from enjoying the fruits of its judgment and that the draft defence annexed to the Defendant's application does not raise triable issues. He went on to state that the Defendant has not instituted any appeal or sought a review as concerns the decree.

8. The application was canvassed by way of written submissions, with the Defendant basically submitting that the Plaintiff's claim does not fall within the ambit of a 'liquidated claim' since the same is not capable of being ascertained by way of arithmetics whereas the Plaintiff insisted that not only is the Defendant out to delay and eventually hinder the Plaintiff from enjoying the fruits of its judgment but also that the present application is *res judicata* in view of the fact that a similar application had previously been filed, heard and determined.

9. The court has duly considered the application, response and submissions filed by the respective parties. It is imperative to begin by stating that the main order on which the present application is premised was also sought in a previous application similarly filed by the Defendant vide an application dated 5th October, 2011, which application was dismissed by the Honourable Justice Mwera vide his Ruling delivered on 21st November, 2011. The question that arises therefore, is whether this court has the jurisdiction to entertain the current motion.

10. The court is guided by *Section 7* of the Civil Procedure Act which stipulates 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 determined by such court."***

11. In the same manner, the court relies upon the Court of Appeal case of ***Rufus Kaimenyi Joseph v Kenya Ports Authority Sports Club Mbaraki [2018] eKLR*** where the Honourable Lady Justice Koome reasoned that:

> ***"…where parties litigate over an issue before a competent court and the same is determined, the same issue cannot be raised again before another court save on appeal. In this case, it is without doubt that the applicant has previously unsuccessfully made an application for extension of time to file an appeal before the trial court…Further, the application before me now is being raised afresh and invokes the original jurisdiction of this Court and not an appeal from the refusal by the trial Judge to extend time. In other words, the applicant is not before this court on appeal of the ruling of the trial court delivered on 29th September, 2017. Rather, he seeks to re litigate his dismissed application afresh. In my own appreciation of the aforesaid legal provisions, the present application, being similar to that heard and determined by the trial court, is indeed res judicata…"***

12. Having internalized the above, the court is required to ask itself whether the issues raised in the motion closely mirror those in the dismissed application dated 5th October, 2011. It is well noted that the motion essentially seeks to set aside the interlocutory judgment so as to enable the Defendant put in his defence. This prayer, was in the former application among others. In fact, to the court's mind it appears the Defendant is not only arguing the merits of the suit in the current application but in essence challenging the ruling delivered in the former one. The court takes recognition of the fact that the Defendant is neither seeking a review nor appealing against the aforementioned ruling. Simply put, the Defendant is litigating the application afresh on the issue of seeking to set aside the interlocutory judgment.

13. In support of its view presented hereinabove, the court wishes to emphasize that it has studied the ruling by Justice Mwea and has come to the finding that the judge substantially addressed the arguments raised by the parties before deciding to dismiss the application of 5th October, 2011. If the previous application was dismissed solely on the basis of the advocates being improperly on record, then the story would have been different. However, this was not the case since the learned judge went ahead to judiciously analyze the other arguments presented by the parties. In view of this, the Defendant's submission that the application was not heard on merit cannot stand. To the court's mind, the application is purely *res judicata*. If at all the Defendant was dissatisfied with the ruling, he had the liberty of challenging the same to the extent of his dissatisfaction, but not bringing a fresh application under similar provisions seeking the same orders.

In view of the above, the court holds that the motion is lacking in merit and the same is hereby dismissed with costs to the plaintiff.

Dated, signed and delivered at **NAIROBI** this **6th** day of December, 2018.

……

L. NJUGUNA

JUDGE

In the presence of

…… For the Plaintiff/Respondent

……. For the Defendant/Applicant