



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC. NO. 318 OF 2015 (OS)**

1. MBARO JOHNSON
2. KASUNGU GONA MASHA
3. SALIM WANJALA KILISWA
4. BAKARI HAMISI KATANA
5. CHARO KARISA JEFWA
6. ATHMAN SALIM
7. KARASU MWARANDU MUMBA
8. KAJUMWA MWAMBOZE
9. KASIMU KHAMISI
10. JOYCE MADZO MPOLE).....PLAINTIFFS

(Suing on their behalf and on the behalf of the squatters/residents of Junda Kasarani Ndogo residing upon property/title no.771/II/MN number 430 appearing in the schedule of members of BAHATI JUNDA SELF HELP GROUP attached to the originating summons herein

**VERSUS**

**TAVETA TEACHERS INVESTMENT LTD.....DEFENDANT/APPLICANT**

**RULING**

1. The application for determination is the Notice of Motion dated 9<sup>th</sup> May, 2019 by the Defendant/Applicant seeking the following orders:

**1. Spent**

**2. That this Honourable Court be pleased to grant an order of stay of execution of the ex-parte judgment delivered on 29<sup>th</sup> March, 2019 herein in favour of the plaintiffs and all the consequential orders thereof pending the hearing and final determination of this application.**

**3. That this Honourable Court be pleased to set aside the ex-parte judgment delivered on 29<sup>th</sup> March, 2019 herein in favour of the plaintiffs and the defendants be allowed to defend its claim.**

**4. That this Honourable court be pleased to order the plaintiff to be recalled for the purpose of being cross-examined.**

5. That this Honourable Court be pleased to order that the Defendant's case be re-opened for purpose of adducing evidence.

6. That the costs of this application be provided for.

2. The application is premised on the grounds on the face of the motion and supported by the affidavit of Esther Sidinyu sworn on 9<sup>th</sup> May 2019 together with the further affidavit of David Righa Mwakio sworn on 14<sup>th</sup> October, 2019. It is stated that on 3<sup>rd</sup> December 2018 the matter proceeded ex-parte during the service week wherein the plaintiff adduced evidence in the absence of the defendant and the defendant's counsel and the defence case was closed. That the applicant's advocates only became aware of the fact that the matter had proceeded when they were served with a mention notice for 6<sup>th</sup> December, 2018 at 4.30 p.m. indicating that the matter will be mentioned on 7<sup>th</sup> December, 2018. It is the applicant's case that the non-attendance of the applicant's counsel during the hearing was not deliberate but was occasioned by an error and mistake on the part of the advocate's counsel for not diarizing the matter in their office diary.

3. It is the applicant's submission that the mistake of their advocate should not be visited upon the applicant. It was further submitted that this court has the discretion in deciding whether or not to set aside the ex-parte judgment to ensure that the applicant herein does not suffer injustice or hardship as a result of an excusable mistake and error of the applicant's advocates. The applicant states that it has demonstrated its willingness to be heard.

4. In opposing the application, the plaintiffs filed a replying affidavit sworn by Mbaro Johnson on 5<sup>th</sup> July 2019 in which it is deposed to, inter alia, that the applicant knew of the hearing date which was given by the court and was on the cause list of the day. That the plaintiffs advocate also served the applicant with a hearing notice but the same was ignored. That an oral application to set aside was made, but the same was dismissed by the court and no appeal made, hence the application herein is res judicata. The plaintiff therefore urged the court to disallow the application.

5. I have considered the application, the affidavits in support and against as well as the rival submissions. The main issue to determine is whether the application herein is res judicata or not and whether the ex-parte judgment entered herein should be set aside and the defendant granted leave to defend the suit.

6. This suit was fixed for hearing before Matheka, J on 3<sup>rd</sup> December, 2018. The record shows that the advocates for the plaintiffs and the advocates for the defendant were duly served with a hearing notice which they received on 14<sup>th</sup> November 2018 and on 15<sup>th</sup> November, 2018 respectively. On 3<sup>rd</sup> December 2018, only the plaintiffs and their advocate attended court. Neither the defendant nor their advocate attended court and therefore the matter proceeded ex-parte.

7. The record further shows that on 7<sup>th</sup> December, 2018, the advocate for the defendant made an application before Matheka J for the defendant to be allowed to defend the suit. Upon hearing both parties, the court rejected the application. Judgment was subsequently delivered in favour of the plaintiffs on 29<sup>th</sup> March 2019.

8. As already stated, the defendant herein made an application before the trial court to set aside the judgment. The court upon hearing both parties rejected that application. Being dissatisfied with the said ruling the defendant filed a notice of appeal dated 20<sup>th</sup> December, 2018 with a view to appeal against the said ruling before the court of Appeal. The defendant has also brought the present application.

9. Section 7 of the Civil Procedure Rules provides as follows:

***“7. No court shall try any suit which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties under whom they or any of them claim, litigating under the same title, in court competent to try such subsequent suit or suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”***

10. Section 28 of the Environment and Land Court Act also bars the court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction. The essential ingredients of the doctrine of res judicata have been expounded in many cases such as **John Florence Maritime Services Limited & Another -v- Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR Karia & Another -v- Attorney General & Others (2005) 1 EA 83 and Kamunye & Others -v- Pioneer General Assurance Society Ltd (1971) EA 263**. It has also been stated that the principle applies to applications with the same force whether the application be final or interlocutory.

11. There is no dispute that the parties are the same in all these proceedings. Both the application herein and the one heard and determined by Matheka, J on 7<sup>th</sup> December, 2018 and which is the subject of a pending appeal, are seeking to set aside the ex-parte judgment entered herein. In my view, these issues are similar in all forms and the court (Matheka, J) determined them in the earlier decision. The statutory provision under Section 7 of the Civil Procedure Act is clear and bars the court from hearing a suit or issue if the same was substantially in issue in a former suit (or application) between the same parties, if the issue was determined in an earlier decision after a hearing. By virtue of Section 7 of the Civil Procedure Act, this application is barred by the doctrine of res judicata. If the applicant was aggrieved by the decision of the court, made on 7<sup>th</sup> December, 2018 by Matheka, J the only recourse was the pursue the course of appeal or review to a higher court. Indeed that is what the applicant has done in this matter by filing the notice of appeal dated 20<sup>th</sup> December, 2018.

12. By reason of the foregoing, it is my finding and I so hold that the Notice of motion dated 9<sup>th</sup> May 2019 is an abuse of the court process as it raises issues which has been substantially litigated upon by a court of competent jurisdiction. In the result, the application is dismissed with costs to the plaintiffs.

DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 29<sup>th</sup> day of July 2020

---

C.K. YANO

JUDGE

**IN THE PRESENCE OF:**

Yumna Court Assistant

C.K. YANO

JUDGE