



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 106 OF 2014**

**THE TRUSTEE OF JESUS WORSHIP ..... PLAINTIFF**

**V E R S U S**

**DAVID M. MUTUNGI ..... DEFENDANT**

**RULING**

1. The provisions of Section 7 of the Civil Procedure Act are-

**“7. 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 (1) of that Section is as follows-

**“The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.”**

2. Before me for consideration is the Notice of Motion dated 22<sup>nd</sup> August 2014 by the Plaintiff, The Trustee of Jesus Worship (for convenience I shall refer to Plaintiff as **the Church**) and the Preliminary Objection dated 3<sup>rd</sup> September 2014 filed by Defendant, David Mutuse Mutungi (I shall henceforth refer to him as ‘**Mutungi**’).
3. I will begin by considering the Preliminary Objection which, if it is successful will render the Church’s Notice of Motion incompetent and I would add that if that Preliminary Objection is successful it will lead to the striking out of the entire suit.

**BACKGROUND**

4. The Church have been tenants of Mutungi since the year 2002 on the property registered in Mutungi’s name, namely Plot No. 202/MN.
5. A suit was filed previously being **Mombasa Civil Case No. 2344 of 2008** by SAMUEL V.

MWAKISHA suing on his behalf and on behalf of JESUS WORSHIP SANCTUARY CHURCH. Mutungi was the Defendant in that case. In that case it was pleaded that rental for the premises was Kshs. 10,000/- but that contrary to the agreed rent Mutungi had invoiced the Church on 30<sup>th</sup> September 2008 for rent of Kshs. 105,000/-. The Church pleaded that in so doing Mutungi had breached the tenancy agreement. The Church sought by that case the following prayer-

**“A mandatory injunction, restraining the Defendant, from evicting, them from the premises they occupy for a period of 12 months, and or in any way interfering with the quiet possession of the premises for a period of 12 months from 1<sup>st</sup> July 2008 until 1<sup>st</sup> July 2009.”**

6. An order was issued by the Court in that case was as follows-

**“THIS SUIT coming up on 3<sup>rd</sup> March 2009 for hearing of the Defendant’s Application dated 20<sup>th</sup> January, 2009 before Honourable Mr. H. B. Yator in the presence of Mr. David Mutungi the Defendant in person AND UPON HEARING the said Defendant IT IS ORDERED:**

- 1. That the suit is dismissed for want of prosecution.**
- 2. That the Plaintiff to give vacant possession of the premises.**
- 3. That the Plaintiff shall pay the Defendant costs of this suit.**

**GIVEN under my hand and seal of the Court at Mombasa this 3<sup>rd</sup> day of March, 2009.**

**ISSUED at Mombasa this 5<sup>th</sup> day of March, 2009.**

.....

**RESIDENT MAGISTRATE**

**MOMBASA.”**

7. On 5<sup>th</sup> March 2009 the Resident Magistrate, in furtherance to the above, issued a warrant to the Court Bailiff to evict Pastor Samuel Mwakisha.

8. That eviction was suspended whilst the Resident Magistrate Court entertained the Church’s application. On 4<sup>th</sup> May 2009 the Church’s application was dismissed when the following orders were made-

- **THAT the application is dismissed for being non-evidenced and lacking in ground basis.**
- **THAT Decree and eviction orders dated 5<sup>th</sup> March 2009 withstands.**
- **THAT the Plaintiff SAMUEL V. MWAKISHA be held in contempt for disobeying lawful eviction Court order and illegally reinstating himself in the building.**
- **THAT the Plaintiff shall pay the Defendant the hiring charges from 11<sup>th</sup> August 2008 to the date of eviction.**

**GIVEN under my hand and seal of the Court at Mombasa this 4<sup>th</sup> May 2009.**

**ISSUED at Mombasa this 21<sup>st</sup> day of October 2009.**

.....

**RESIDENT MAGISTRATE**

**MOMBASA.”**

9. Fresh warrants were issued by the Magistrate’s Court on 2<sup>nd</sup> December 2009 and an order dated 11<sup>th</sup> December 2009 directed to OCPD Kisauni to assist in arresting Pastor Samuel Mwakisha was also issued.
10. Pastor Samuel Mwakisha suing on his behalf and on behalf of the Church filed an appeal in Mombasa High Court being Civil Appeal No. 229 of 2009 against the orders of eviction and arrest by the Resident Magistrate. Although temporary orders of stay were granted by the High Court the appeal was determined by an order of consent which was signed by Counsel for the Appellant, that is the Pastor and the Church and Mutungi in person as the Respondent. That consent was as follows-

**“7<sup>th</sup> September, 2010**

**Deputy Registrar,**

**High Court of Kenya,**

**MOMBASA**

**Dear Sir,**

**RE: HC CIVIL APPEAL NO. 229 OF 2009**

**PASTOR SAMUEL V. MWAKISHA (Suing on his own behalf and on behalf of JESUS WORSHIP SANCTUARY CHURCH –Vs- DAVID MUTUNGI**

**Please refer to the above matter and kindly record the following consent order:-**

**“BY CONSENT of the parties herein, this matter is marked as settled in the following terms:-**

- 1. That the parties fully adopt and reiterate the contents of the Agreement for Sale dated the 3<sup>rd</sup> day of September, 2010 executed by the parties herein.**
- 2. That in the event of either party defaulting from the respective obligations therein spelt out, the consequences therein spelt out to follow.**
- 3. No order as to costs.”**

**Yours faithfully,**

**GIKANDI & COMPANY**

**(ADVOCATES FOR THE APPELLANT)**

**I agree**

**MR. DAVID MUTUNGI**

**(RESPONDENT IN PERSON).”**

That consent was filed in Mombasa High Court registry on 21<sup>st</sup> September 2010. On 4<sup>th</sup> January 2011 the following order was issued by the High Court:-

**“CLAIM FOR:-**

a. **Rents payable**

By default of consent order dated 7<sup>th</sup> September, 2010 and filed in Court on the 21<sup>st</sup> September, 2010 and signed by Mr. Gikandi Counsel for the Appellant and Mr. David Mutuse Mutungi the Respondent herein, and the sale agreement dated 3<sup>rd</sup> September, 2010 between the Appellant and the Respondent in the presence of the Appellant's Advocates stipulating terms and conditions of sale of one of the two (2) plots and building sitting on Plot No. 202/II/MN.

AND UPON FAILURE by the Appellant to comply and adhere to the said consent order and the terms and conditions of the agreement of sale dated 3<sup>rd</sup> September, 2010 and in particular Clause No. 6 and moreover having failed totally to honour payments on or before 30<sup>th</sup> December, 2010 as per consequences spelt out in the agreement:-

**IT IS HEREBY ORDERED:-**

1. That the matter is marked as settled to the parties.
2. That the parties are in agreement plots cum buildings belongs to the Respondent Mr. David Mutuse Mutungi.
3. That having failed to comply with the terms and conditions of the sale agreement the consequences spelt out in the agreement are thus:-
  - a. Appellant is liable to be evicted.
  - b. Appellant forfeits all monies paid pursuant to the agreement.
  - c. Rents payable with stands.

GIVEN under my hand and seal of the Honourable Court this 21<sup>st</sup> day of September, 2010.

ISSUED at Mombasa this 4<sup>th</sup> day of January, 2011.

DEPUTY REGISTRAR

MOMBASA.”

The Clause that the Pastor is said to have breached in the agreement of sale is the one that required the purchaser to make payment. Clause 6 provided-

**“That should the purchaser fail to effect any payment as agreed then the purchaser shall forthwith be liable to be evicted from the premises and shall forfeit all the monies paid to the vendor pursuant to this agreement for sale and the purchaser shall have no other claim against the vendor whatsoever and howsoever.”**

11. The agreement alluded to in that consent was an agreement of sale of the property by Mutungi to Jesus Worship Sanctuary, Mshomoroni Mombasa represented by Pastor Samuel V. Mwakisha. The agreed purchase price was Kshs. 1,750,000/- to be paid as follows; Kshs. 300,000/- to be paid on or before 30<sup>th</sup> October 2010; Kshs. 400,000/- to be paid on 30<sup>th</sup> June 2011; Kshs. 1,050,000/- on or before 30<sup>th</sup> October 2011. On the payment of the last instalment Mutungi was to present title and transfer documents to M/s Gikandi & Co. Advocates which firm was then to release a bankers cheque of Kshs. 1,050,000/- to Mutungi.

**THIS CASE**

12. By this suit, filed by the Church, against Mutungi, the Church seeks to enforce the Agreement of sale by an order of specific performance. It is pleaded in the Complaint of this case as follows-

- a. **The Plaintiffs states that they are willing to deposit in Court and or pay the Defendant directly Kenya Shillings one million (Kshs. 1,000,000/-) and the balance of Kenya Shillings four hundred thousand (Kshs. 400,000/-) plus costs of both suits to be paid within a term to be set by the Honourable Court.**
- b. **The Plaintiffs pray from the Honourable Court to revive the sale agreement and order specific performance for the Plaintiff to comply.**

### **CASE CMCC NO. 2344 OF 2008**

13. What seems to have provoked the Church to bring this case in the High Court is the order made by the Resident Magistrate on 25<sup>th</sup> July 2014 in **CMCC No. 2344 of 2008**.
14. The Magistrate's Court in that Ruling of 25<sup>th</sup> July 2014 found that the Church and its Pastor had failed to comply with the terms of the Agreement for sale and that as per Clause 6 of that agreement the Church ought to have given Mutungi vacant possession. The Resident Magistrate further found the Pastor of the Church to be in contempt of Court order of 5<sup>th</sup> March 2009, and accordingly ordered him to pay a fine of Kshs. 50,000/- and in default to serve 30 days imprisonment.

### **ANALYSIS**

15. It has been necessary to tediously go through that detailed background in order to show that Mutungi's Preliminary Objection that this suit is *res judicata* is well taken.
16. The Resident Magistrate on 25<sup>th</sup> July 2014 made a finding that the Church and its Pastor are in breach of the Agreement of Sale. The High Court in Civil Appeal No. 229 of 2009 decreed that the Church and its Pastor had failed to comply with parties consent which consent related to the Agreement for sale. It is that same agreement for sale that the Church now seeks by this case orders for specific performance.
17. The various decisions of the Court show that a party cannot relitigate issues in another matter. This was made clear in the following case **POP-IN (KENYA) LTD & 3 OTHERS –Vs- HABIB BANK AG ZURICH** where it was held-

**“The plea of *res judicata* applies not only to points upon which the Court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have been brought forward at the time.”**

The Court in making decision in the above case also approved the finding of the case of **Hystead and Others Vs Taxation Commissioner, (1925)ALL ER 56 Pg 56** as follows-

**“The admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgment upon a different assumption of fact: Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted, litigation would have no end, except when legal ingenuity is exhausted. It is principle of law that this cannot be permitted.”**

In the case **HENDERSON –Vs- HENDERSON (1843-60)ALL E.R. 378** the Court on discussing that doctrine of *res judicata* stated-

**“... Where a given matter becomes the subject of litigation in, and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applied, except in special case not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which property belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”**

The case of E.T. –Vs- ATTORNEY GENERAL & ANOTHER (2012)eKLR where it was held that:-

**“The Courts must always be vigilant to guard litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the Plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction. In the case of OMONDI Vs NATIONAL BANK OF KENYA LIMITED AND OTHERS (2001)EA 177 the Court held that, ‘parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.’ In that case the Court quoted Kuloba J., in the case of Njangu Vs Wambugu and another Nairobi HCCC No. 2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata* ...”**

18. In view of the above holdings and considering the facts of this case set out above I find that this case is defeated by the doctrine of *res judicata*. The issue brought for determination in this case was determined in Mbsa HCCA No. 220 of 2009 and Mbsa CMCC No. 2344 of 2008. It cannot again be relitigated in this case. There has got to be an end to litigation. Surprisingly Mutungi who has acted in person in this matter appreciated that point when he deposed-

**“That even as a layman with only basic knowledge of the laws of the land, when there is an order of the Court, the same can only be challenged through an appeal to a higher court or through a review but not by filing a fresh suit.”**

My response to that deposition is, touch’e.

### **CONCLUSION**

19. The consequence of the above finding is as follows-

- a. This case is hereby struck out for being *res judicata*.
- b. The Defendant is awarded costs of the suit, costs of the Notice of Motion dated 22<sup>nd</sup> August 2014 and costs of Preliminary Objection dated 3<sup>rd</sup> September 2014.

DATED and DELIVERED at MOMBASA this 5<sup>TH</sup> day of MARCH, 2015.

MARY KASANGO

JUDGE