



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

**AT MOMBASA**

**CIVIL CASE NO. 227 OF 2005**

**ALEX OKUMU & 213 OTHERS .....PLAINTIFFS**

**V E R S U S**

**NATIONAL HOUSING CORPORATION ..... DEFENDANT**

**RULING**

1. The 214 Plaintiffs in this action are tenants of the Defendant in Defendant's residential houses situated in Changamwe Mombasa.
2. Defendant has filed Preliminary Objection dated 17<sup>th</sup> February 2014 to the pending applications and to this action. The Objections are indeed convoluted. The Objections are as follows-

**“1. By virtue of Sections 6 and 7 of the Civil Procedure Act – Cap 21 – Laws of Kenya, the Court cannot entertain this Suit and the Motion dated 20/01/2014 in light of the Two Previous Applications for injunction filed by the Plaintiffs namely; Chamber Summons dated 26/10/2005 seeking similar injunctive Orders and Chamber Summons dated 02/08/2007 also seeking Injunctive Orders against distress for non-payment of rent.**

**2. The Plaintiffs have by themselves, their agents and persons claiming Authority under them filed Four (4) other Suits before this Honourable Court seeking similar reliefs in respect of the same subject matter namely; Mombasa, SPMCC 1843/94, HCCC 1605/98, CMCC 5055/04 and HCCC 102/05 and consequently the present suit and application is a Gross abuse of the Court process.**

**3. Subsequent to the filing of this Suit and the Four (4) previous suits named above, the Plaintiffs filed yet another Suit Mombasa – HCCC 137”B”/2007 and a similar injunction Application dated 28/03/2007 which was apparently determined Ex-parte on 18/05/2007 and the same has also been abandoned by the Plaintiffs.**

**4. The entire proceedings are therefore Res Judicata and Contravenes Section 6 of the Cap 21 and should be struck out and/or dismissed with costs and all the six (6) files either Consolidated or Stayed for a single determination. The Plaintiffs have also failed to comply with the Orders of the Hon. Justice Mwera given on 09/10/2012.**

**5. The orders granted herein on 24/01/2014 Ex-parte were obtained through Gross Concealment of material facts and non-disclosure and the same violates the provisions of Order 40 Rule 4(2) of the Civil Procedure Rules and should be discharged/vacated forthwith.”**

## **BACKGROUND**

3. 214 Plaintiffs filed this action on 26<sup>th</sup> October 2005 seeking for injunctive orders to restrain Defendant from increasing the monthly rent payable by each and restraining order to stop Defendant from altering the terms of each tenancy. The Plaintiffs also sought a declaration of the fair market rental of the premises.
4. Plaintiffs filed a Chamber Summons application dated 26<sup>th</sup> October 2005 seeking an interlocutory injunction to restrain Defendant from increasing rent. That Chamber Summons was heard ex parte on 27<sup>th</sup> October 2005 when it was certified as urgent and although no interim orders were granted, on all the other subsequent date that the Chamber Summons was fixed the Court extended interim orders that did not exist.
5. Plaintiffs filed another Chamber Summons application dated 18<sup>th</sup> August 2006 seeking leave to amend the plaint. To date that Chamber Summons has remained unprosecuted.
6. Plaintiffs filed Chamber Summons dated 2<sup>nd</sup> August, 2007 for injunctive orders to restrain Defendants from removing from Plaintiff's premises proclaimed goods. That Chamber Summons was withdrawn by Plaintiff with costs to Defendant on 30<sup>th</sup> October 2007.
7. On 24<sup>th</sup> January 2014 Plaintiffs filed Notice of Motion dated 20<sup>th</sup> January 2014 seeking to restrain Defendant from levying distress for rent.
8. The only applications subsisting and on record are three. One is dated 26<sup>th</sup> October, 2005, the second is dated 18<sup>th</sup> August 2006 and the third is dated 20<sup>th</sup> January 2014.
9. Learned Counsel Mr. Kopere for the Defendant submitted the Plaintiffs said applications remained unprosecuted and much more that the Plaintiffs have filed several other suits before this Court and the Chief Magistrate's Court relating to their tenancy of the Defendant's premises which suits have remained unprosecuted. This argued learned Counsel stated was an abuse of the Court's process. That the Plaintiffs on 24<sup>th</sup> January 2014 obtained ex parte orders on the Notice of Motion dated 20<sup>th</sup> January 2014 and they were using that order to restrain the Defendant from collecting rent.
10. Learned Counsel Miss Nyagena for the Plaintiffs stated that the applications still subsisting did not seek similar prayers. She therefore stated that the Plaintiffs were not abusing the Court's process. Further she submitted that the other suits filed in respect of the suit property were filed by other parties other than the Plaintiffs.

## **ANALYSIS**

11. The Defendant has raised Preliminary Objections as reproduced

above. It is necessary at this point to consider whether the objection raised by defence falls within what has been defined as a Preliminary Objection. The definition is to be found in the case **MUKISA BISCUIT MANUFACTURING CO. LTD –Vs- WEST END DISTRIBUTORS LTD [1969]E.A. 699** as per Law J.A where he stated-

**“So far as I am aware, a preliminary objection consists or a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”**

As per Sir Charles Newbold P:

**“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

The case **ORARO –Vs- MBAJJA [2005]eKLR** what constitutes a Preliminary Objection was discussed and the Court stated-

**“I think the principle is abundantly clear. A ‘preliminary objection’, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement ... that ‘where a court needs to investigate facts, a matter cannot be raised as a preliminary point.’”**

12. Bearing the above two cases in mind it does become clear that the Defendant’s objection does not fit the definition of what a Preliminary Objection is. As correctly submitted by Plaintiff’s learned Counsel the applications that are subsisting do not seek the same prayers. It is because of those divergent views of what the applications represent and because I do indeed find that the Plaintiffs’ applications do not offend Section 6 of the Civil Procedure Rules that I find the Defendant’s objection No. 1 must fail.

13. Similarly objection Nos. 2 and 3 require this Court to enter into an inquiry on whether the other suits filed were filed by the same Plaintiffs as in this case. That is not a proper procedure when the Court is called upon to determine a Preliminary Objection. The defence ought to have filed an application setting out grounds why the other suits filed are an abuse of the Court process and it is then that Plaintiffs would have had an opportunity to respond to the application.

14. In respect of Objection No. 4, the Defendant failed to show that Section 7 of the Civil Procedure Act had been met. Defendant needed to show that the suit before Court was in issue in a former suit which had been heard and finally decided. The Court of Appeal in the case **CANELAND LTD AND OTHERS –Vs- DELPHIS BANK Civil Appeal No. 20 of 2000**, on what is resjudicata stated-

**“For res-judicata to arise the issue must have been heard and decided on merit otherwise the plea cannot be sustained.”**

This is what Section 7 provides-

**“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.”**

15. A Court in the case **ABOK JAMES ODERA –VS- JOHN PATRICK**

**MACHIRA CIVIL APPLICATION NO. 49 OF 2001** stated that for res-judicata to be upheld there must be-

- i. **A previous suit in which the matter was in issue.**
- ii. **The parties were the same or litigating under the same title.**
- iii. **A competent Court heard the matter in issue.**
- iv. **The issue has been raised again in a fresh suit.**

The Defendant did not meet the requirements of that Section and accordingly Objection No. 4 fails.

15. Objection No. 5 ought to really be raised in opposition to the Plaintiff's application for injunction because the Court cannot, at the hearing of a Preliminary Objection determine whether Plaintiffs concealed any facts when obtaining ex parte injunction orders on 24<sup>th</sup> January 2014.

16. In the end the Defendants Preliminary Objection dated 17<sup>th</sup> February 2014 is dismissed with costs to the Plaintiffs.

17. The Court has however found from the affidavits filed herein that there are several cases pending before this Court and the Chief Magistrate's Court relating to the same issue. At the reading of this Ruling the Court shall give a date for directions to be given on this matter and on the other pending matters.

**DATED and DELIVERED at MOMBASA this 15<sup>TH</sup> day of MAY, 2014.**

**MARY KASANGO**

**JUDGE**