



IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 112 OF 2014

ELISTONE MBELA & 20 OTHERS APPELLANTS

-V E R S U S-

NATIONAL HOUSING CORPORATION RESPONDENT

(Appeal from the judgment of the Resident Magistrate at Mombasa (Hon. R. M. Kitagwa) dated 27th March 2014 delivered on 10th April 2014 in Resident Magistrate's Court Civil Case No. 2665 of 2008)

RULING

1. Appellants previously, on 7th May 2014, filed another Appeal being Mombasa **HCCA No. 61 of 2014**. The Memorandum filed in this present appeal is a replica of the one filed in **HCCA No. 61 of 2014**.
2. In **HCCA No. 61 of 2014** Appellants filed a Notice of Motion dated 7th May 2014. They sought by that application stay of the decree in **Mombasa RMCC No. 2665 of 2008**. The exact wording of that Notice of Motion was-

“THAT there be a stay of execution of the decree/decision in Civil Case Number 2665 of 2008; Elistone Mbela & 20 Others V National Housing Corporation granted on 10th April 2014 by Hon. Kitagwa R. M. and all other consequential orders pending the hearing and determination of Civil Appeal Number 61 of 2014, Elistone Mbela & 20 Others V National Housing Corporation.”

3. The Court in **HCCA No. 61 of 2014** delivered a Ruling on 17th July 2014 where the Court ruled that the lower Court order, being a negative order no order of stay could be granted. The Court also by that Ruling held that the Appellants had filed their Memorandum out of the 30 days provided for under Section 79G of the Civil Procedure Act.
4. Appellants rather than filing an appeal against the above finding filed this present appeal whose grounds of appeal, as stated above, are a replica of those in **HCCA No. 61 of 2014**. Appellants also filed an application by Notice of Motion dated 15th September 2014 seeking the following prayers-
 - **THAT there be stay of the lower Court Judgment and any consequential decree as delivered by Honourable R. M. Kitagwa on 27th March 2014 in Civil Case Number 2665 of 2008:**

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- **THAT pending the interpartes hearing and determination of the Application there be a stay of proclamation of the Applicants movable properties by the Auctioneers as instructed by the Respondent and also that the Respondent does stop distress for rent against the Applicants until the hearing of the Application inter partes.**
- **THAT the Applicants be granted extension of time to file an Appeal against the judgment of Hon. R. M. Kitagwa delivered on the 27th March 2014 in Mombasa RMCC NO. 2665 of 2008: Elistone Mbela & 20 Others Vs. National Housing Corporation.**

Those are the prayers that this Ruling is directed to.

5. It became clear that Appellants have abused the Court process by filing two similar appeals. The two appeals which challenge the same order of the lower Court are both subsisting. The filing of this present appeal when the other **HCCA NO. 61 OF 2014** is still subsisting is certainly an abuse of the Court process. The Court under its inherent jurisdiction can stop such an abuse. Further the Court by invoking the overriding principle of Section 1A and 1B of the Civil Procedure Act Cap 21 can stop a party from abusing the Court process.
6. The filing of this second appeal challenging the same order and relying on replica of the grounds of appeal is an abuse of the process which calls upon this Court to strike out this appeal. The Appeal cannot even be sustained under Section 6 of Cap 21. Under that Section the Court is empowered to stay a suit that directly or substantially in issue in a previous suit. In this case the filing of this appeal is a duplication of the previous appeal and this appeal therefore is beyond the scenario provided for in Section 6 of Cap 21.
7. Further I find that the Notice of Motion dated 15th September 2014 in this appeal is *res judicata* to the one in **HCCA NO. 61 OF 2014**. The Notice of Motion dated 15th September 2014 contravenes the provisions of Section 7 of Cap 21, which Section 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.”

8. Those provisions of Section 7 refer to orders that may have been included in the Notice of Motion dated 15th September 2014 and which ought to have been made a ground of defence. The question on whether the doctrine of *res judicata* applies equally to an application was considered by the Court of Appeal in the case **UHURU HIGHWAY DEVELOPMENT LTD –Vs- CENTRAL BANK OF KENYA & 2 OTHERS CIVIL APPEAL NO. 36 OF 1996**. The Court of Appeal in this case stated-

“What is before us is: can a matter of interlocutory nature decided in one suit be subject of another similar application in the same suit? Does the principle of res judicata apply to an application heard and determined in the same suit?

There is no doubt at all that provisions of Section 7 of our Civil Procedure Act relating to res judicata in regard to suits do apply to applications for execution of decrees but there is no doubt, also, that these provisions are governed by principles analogous to those of res judicata.

... There is not one case cited to show that an application in a suit once decided by Courts

of competent jurisdictions can be filed once again for a rehearing. This shows only one intention on the part of the legislature in India and our Civil Procedure Act. That is to say, there must be an end to applications of similar nature; that is to say further, wider principles of *res judicata* apply to applications with the suit. If that was not the intention, we can imagine that the Courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation.”

In the case HENDERSON –Vs- HENDERSON (1843-60)ALL E.R. 378 the Court on discussing that doctrine 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.”

9. That being said I do find that Appellants’ Notice of Motion dated 15th

September 2014 offends the doctrine of *res judicata* and on that ground it must fail.

10. In the end the Court makes the following orders-

- a. This appeal is hereby struck out with cost for being an abuse of the Court process.
- b. The Notice of Motion dated 15th September 2014 is dismissed with costs for being *res judicata*.

DATED and DELIVERED at MOMBASA this 4TH day of DECEMBER, 2014.

MARY KASANGO

JUDGE