



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE 127 OF 1993

FRANCIS OSORO MARKO PLAINTIFF/RESPONDENT

VERSUS

NYAGWOKA OGORA alias

KENNEDY KEMONI BWOOGARA INTERESTED PARTY/APPLICANT

RULING

1. This ruling relates to the plaintiff's/respondent's preliminary objection dated 13th January 2012 and filed in court on 16th January 2012. The preliminary objection is against the applicant's Notice of Motion dated 12th July 2011. The preliminary objection is premised on the following eight (8) grounds:-

1. *The instant Application is pre-mature, misconceived and otherwise bad in law.*
2. *The instant Application has been filed and/or mounted by a stranger, without the requisite locus standi to mount the Application, more particularly anchored on prayers 4, 5 & 6 thereof.*
3. *The issues vide the instant Application have hitherto been heard and adjudicated upon vide KISII HCC NO.502 OF 1997, Court of Appeal Civil Appeal No.271 of 2001 and KISII HCC NO.126 of 2010, respectively. Consequently, the instant Application, is Res-Judicata.*
4. *In the premises, the instant Application is barred and/or prohibited by section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya.*
5. *In this regard, the Interested Party/Applicant is non-suited as against the plaintiff/respondent.*
6. *The instant application is calculated to impeach the judgments rendered vide KISII HCC NO.502 OF 1997, Court of Appeal Civil Appeal No.271 of 2001 and KISII HCC NO.126 OF 2010, respectively. Consequently, the instant Application is bound to create judicial anarchy.*
7. *The instant Application constitutes and/or amounts to classic abuse of the Court Process.*
8. *The Advocate for the Interested Party/Applicant is guilty of breach and/or abuse of Professional Ethics & Etiquette. In the premises, the instant Application ought to be struck out Ex-Debito Justitiae.*

2. By the Notice of Motion dated 12th July 2011, the Interested Party/Applicant seeks the following eight (8) orders:-

1. Service of this application be dispensed with in the first instance as the object of this application will be defeated and rendered nugatory if the defendant/respondent continue with their unlawful acts against the plaintiff/applicant which include forcefully evicting the tenants, forcefully and unlawfully executing an order on a wrong plot and harassing, intimidating, and threatening to demolish and/or pull down the Interested Party/Applicant building and interfering with the quiet and peaceful enjoyment of his property situated on plot No.24”A” Nyakoe market.

2. This Honourable Court be pleased to enjoin NYAGWOKA OGORA (alias KENNEDY KEMONI BWOOGARA) in this suit for purposes of this application as an interested party.

3. Pending the hearing and determination of this application interpartes the defendant/respondent by himself, his servants, agents or otherwise howsoever be restrained by way of an interim temporary injunction or a qua timet injunction from entering, demolishing, threatening to pull down or in any other manner whatsoever interfering with Plot No.24 “A” Nyakoe market. Or

4. In the alternative a stay of execution of the decree herein be issued pending the hearing and determination of this application.

5. A declaration do issue to the effect Plot No.19”B” measures 50 feet by 50 feet as pleaded in the plaint and does not extend to plot No. 24”A” Nyakoe market belonging to the interested party herein.

6. The eviction of the tenants occupying plot No.24”A” Nyakoe market be declared illegal, null and void.

7. Other and further consequential directions be given as the court may deem fit and just.

8. The costs of this application be awarded for.

3. The said application is supported by the grounds on the face thereof and in particular that the plaintiff/respondent has threatened to demolish the Interested Party’s premises situated on plot 24”A” and further that the plaintiff/respondent has obtained an eviction order to evict the defendant from plot No. 19”B” Nyakoe Market but has opted to evict the tenants on plot No.24”A” belonging to the Interested Party; and that if the orders sought are not granted, the Interested Party who is the lawful owner of Plot No.24”A” Nyakoe Market stands to suffer irreparable loss.

4. Briefly, this suit was commenced by way of a plaint dated 10th March 1993 and filed in court on 11th March 1993 seeking the following reliefs:-

a) A declaration that the plaintiff/respondent is the owner of the acreage of plot No.19B to wit 50 ft by 50ft.

b) A permanent injunction do issue restraining the defendant, his agents and or servants from trespassing upon the said portion of plot No.19B.

c) Costs of this suit.

d) Any other remedy which this Honourable Court may deem fit to grant.

5. Subsequent to the filing of the suit, the defendant entered appearance and filed statement of defence and thereafter the parties agreed vide the order recorded in court on 4th March 1994 to refer the dispute to arbitration. This was done and the matter was arbitrated upon. The arbitral award was adopted as a judgment of the court vide an order of the court dated 15th February 1995.

6. Consequent upon the adoption of the arbitral award as a judgment of the court, the plaintiff/respondent extracted a decree and eviction proceedings against the defendant commenced. The defendant was

successfully evicted from the suit plot and the structures standing thereon were also demolished.

7. Following the eviction and demolition, the applicant herein who is son to the defendant in this case contended that the demolition had taken place on plot No.24 Nyakoe market and not 19B and on that basis, the applicant herein filed Kisii HCCC No.502 of 1997, seeking compensation for the demolished structures. That suit was heard and dismissed by the judgment of the court (Waweru, J) dated 2nd August 2001.

8. The Interested Party/Applicant being dissatisfied with the judgment of the court dated 2nd August 2001, mounted Civil Appeal No.271 of 2001 to the Court of Appeal. That appeal was heard and determined by the Court of Appeal vide its judgment delivered on 11th June 2004 dismissing the appeal. The applicant did not exhibit the judgment of the Court of Appeal to his supporting affidavit, but the plaintiff/respondent did so to his Replying Affidavit. The appeal was dismissed on grounds that the applicant's testimony during the trial appeared less credible than that of the plaintiff/respondent and further that the witnesses called by the applicant were likely to be partisan witnesses.

9. After the Court of Appeal dismissed the applicant's appeal, the **HCCC (KISII) NO.127 OF 1993 NO.514** applicant mounted another case being Kisii HCCC No.126 of 2010. The Plaintiff/Respondent raised a Preliminary Objection to that suit, arguing as he is doing in the instant preliminary objection that CC 126 of 2010 was res judicata. This court heard the preliminary objection and delivered its ruling on 7th July 2011 sustaining the preliminary objection and striking out the applicant's suit together with the accompanying application. The court has not been informed whether or not the applicant has appealed the ruling of 7th July 2011, but what is certain is that the applicant filed the application dated 12th July 2011. The application was filed some 5 days after the court delivered its ruling on 7th July 2011.

10. It is thus the plaintiff's/respondent's case that the applicant's Notice of Motion dated 12th July 2011 should not be allowed to stand because the same is res judicata and an abuse of the court process. It is also the plaintiff's/respondent's case that the applicant has no locus standi in this matter with regard to the substantive orders being sought because he is not a party to this suit. The plaintiff/respondent contends that taking the history of this case into account, and the multiple suits/applications which have been filed by the applicant/interested party, all of which suits/applications have either been dismissed or struck out, the only description that befits the applicant herein is that of a **"busybody"** whose sole purpose in engaging the plaintiff/respondent in endless litigation is to defeat the course of justice and help the Defendant/Respondent in the circus of circumventing and/or short-circuiting the enforcement and/or implementation of a lawful court decree.

11. Counsel for the plaintiff/respondent has placed before this court a number of authorities to support the plaintiff's contention that the applicant's notice of motion dated 12th July 2011 is an abuse of court process, is res judicata and smirks of breach of professional ethics and further that the applicant himself has no locus standi in the matter since he seeks in one and the same application leave to be enjoined in the suit as well as substantive orders. I have read through all the authorities which are illuminating on the issues in controversy. For the reason, that the preliminary objection is anchored mainly on the issue of res judicata, **section 7 of the CPA, Cap 21 Laws of Kenya** deserves special mention. The section provides as follows:-

"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) – The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2) – For the purposes of this section, the competence of a court shall be

determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3) – The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5) – Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6) – Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

12. It has been held that for res judicata to apply, parties and issues must be the same. See **Leonard Indiazzi –vs- Fimsta Omukama Kami Atingo – Civil Appeal No. 169 of 1996 – Court of Appeal at Nairobi**. It is also worth remembering that where a suit has been dismissed on a preliminary point (as happened in Kisii HCCC 126 of 2010), the plaintiff has not had an opportunity of being heard on the merits and such a suit is therefore not res judicata. See **Keharchand –vs- Jan Mohammed [1919-1921] EACA 64**.

13. The Applicant/Interested Party has contended that despite the long history of this case, the court has not made a decision as regards buildings situated on plot No.24 Nyakoe market, and that it behoves the court to strive to hear the applicant substantively on this issue without regard to technicalities so that the applicant does not suffer the injustice of not being heard on his claims on the merits.

14. The applicant therefore contends that the instant preliminary objection is not valid, particularly taking the provisions of **section 34** of the **CPA, Cap 21 Laws of Kenya**, into account, which provisions require the court to give directions under **section 34 (2)** and that without such directions having been given, the applicant herein cannot be said to be devoid of locus standi. A reading of **section 34 (3)** of the **CPA**, in my view, clearly shows that the plaintiff/respondent and the defendant in this suit are the parties to the suit. Anybody else, including the applicant herein, must be enjoined in the suit by leave of the court.

15. Counsel for the applicant also contends that the instant application is not res judicata because it arises from the wrongful execution of the decree under **section 34** of the **CPA**, and further that the issue raised by the plaintiff/respondent herein, namely sub-division of Plot No.24 Nyakoe market is a new issue and cannot be said to be res judicata.

16. Finally, counsel argued and contended that the preliminary objection as filed does not meet the threshold set out by the case of **Mukisa Biscuit Manufacturing Co. Ltd. –vs- West End Distributors Limited [1969] EA 696** at page 701. Counsel wants this court to apply the provisions of **Article 159 (2) (d)** of the **Constitution** and to administer justice in this case without undue regard to procedural technicalities. Reliance for the applicant’s arguments were placed on the **Mukisa Biscuit case** (above) and also on **Kibogy –vs- Chemweno – Court of Appeal at Nairobi Civil Appeal No.41 of 1980** and **Nyali Beach Hotel Ltd. –vs- Kenya Commercial Bank Limited & another [2006] 1 EA 304**.

17. In the **Nyali Beach Hotel Case** (above) the plaintiff filed an application for injunction seeking to restrain the defendants from further advertising for sale, disposing off, selling by public auction or otherwise howsoever or by completing by transfer of any sale concluded by auction or private treaty, leasing, letting or otherwise however interfering with the plaintiff’s movables on land title number 1546 section IMN Mombasa otherwise known as Nyali Beach Hotel. The plaintiff also wished to obtain an order pursuant to **section 52** of the **Indian Transfer of Property Act**, all further registration or change of registration in the ownership, leasing subleasing, allotment, user, occupation or possession of the suit property as long as the suit remained pending. The defendants filed a Notice of Preliminary Objection on

the grounds that the suit was res judicata and that the plaintiff lacked capacity to file the suit. It was filed, *inter alia*, that:-

The doctrine of res judicata gives rise to a mandatory bar from any fresh trial of a concluded issue. There was no way of going round what the Legislature has forbidden – Rajwani –vs- Roden [1990] KLR4.

18. The principle of res judicata as stated in the **Nyali Beach Hotel case** (above) is correct and I agree with the same.

19. I have now carefully read all the pleadings on this file including the rulings and judgments pronounced by the courts in this matter. Applying the law to the facts that are before me, I would allow the preliminary objection on the following grounds. One is that based on the judgments in Kisii HCCC No.502 of 1997 and Court of Appeal Civil Appeal No.271 of 2001, the issues which the applicant wants to pursue in this case are issues that have been canvassed and determined. It does not matter by whatever name the applicant wants to call them, these issues have been heard and determined by the court. It is not a matter of dealing with this case on technicalities. The issues herein have been substantively determined and reopening them would run contrary to the provisions of **section 7** of the **CPA**. I have already observed that this suit, ordinarily, would not be res judicata this court's ruling of 7th July 2011, since the applicant was not heard on the merit, but this case went to arbitration with the consent of the plaintiff and defendant, an award was made and thereafter same was adopted as a judgment of the court and a decree subsequently drawn and executed. An appeal to the Court of Appeal on the same issues was dismissed. This process cannot be wished away as a matter of technicality. Decisions have been made on the issue and I therefore do not agree with the position taken by the applicant that the issue of the demolished structures has never been addressed. The applicant should carefully read the judgment of Waweru, J. in Kisii HCCC No.502 of 1999 and the judgment of the Court of Appeal in CA NO.271 of 2001. It appears to me that by filing these many suits and applications seeking very similar orders, the applicant's actions amount to abuse of court process. See **National Bank of Kenya Ltd. –vs- John Odawa Oluoch [1997] LLR 5428.**

20. Secondly, I would allow the preliminary objection for reasons that the application by which the applicant seeks substantive orders is the same application by which he seeks leave to be enjoined in the suit. He should have taken one step at a time, knowing fully well that he is not a party to this suit as stipulated under the provisions of **section 34 (3)** of the **CPA**.

21. Regarding the final point of contention, being issue number 8 raised by counsel for the plaintiff/respondent, namely breach of professional ethics, I wish to make two points. One is that each person, whether advocate or not, has a conscience within him. Counsel for the applicant, who also appears for the defendant/respondent in this matter must have had a reason for deciding so to act. What is clear from the pleadings though is that the interests of the defendant are at variance with those of the applicant. But as rightly submitted by counsel for the applicant, this ground 8 would not form the basis of a preliminary objection.

22. The second point I wish to make on this point is that where it appears to the court, as it does appear in the instant case, that a litigant is assisted by his counsel to prolong the process of litigation, then the court must be on guard and move swiftly to apply its inherent power to put a stop to such litigation. This is what Halisbury's Laws of England, 4th Edition Volume 37 para.14 talks about under the heading **"Inherent Jurisdiction of the Court"** at P.23, and as applied by Khamoni J. in **Nakuru HC Civil Case No.262 of 2005 – Rev. Madara Evans Okanga Dondo –vs- Housing Finance Company of Kenya Ltd.-**

"The jurisdiction of the court which is comprised within the term

"inherent" is that which enables it to fulfill itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary

process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise (i)control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process --- In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

I say no more on this issue.

23. In the premises and for the reasons above given, I allow the plaintiff’s preliminary objection dated 13th January 2012 and filed in court on 16th January 2012. Accordingly, the Notice of Motion dated 12th July 2012 be and is hereby dismissed with costs to the Plaintiff/Respondent.

24. Lastly, the delay in delivering this ruling/judgment is very much regretted. At the time it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9th July 2012.

25. It is so ordered.

Dated and delivered in open court at Kisii this 7th day of September, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Nyamurongi for Mr. Oguttu-Mboya (present) for Plaintiff/Respondent

M/s Bosire Gichana (absent) for Defendant/Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.