



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 86 OF 2017

MARY KARIMI MURAGHI.....PLAINTIFF/APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF MOMBASA.....DEFENDANT

RULING

1. The Plaintiff/Applicant moved the Court vide notice of motion dated 9th March 2017 brought under the provisions of Order 45 of the Civil Procedure Rules and Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act for grant of orders that:

i) Spent

ii) Spent

iii) Spent

iv) That the honourable Court do grant the plaintiff a temporary injunction restraining the defendant from interfering, entering upon, demolishing or evicting the plaintiff from the suit property pending hearing and determination of the suit.

v) That the defendant be compelled to accept payment of rent and or in the alternative, the plaintiff be allowed to deposit rent in Court.

vi) The costs of the application be provided for.

2. The application is premised on the grounds listed on the face of it inter alia that the applicant is a tenant of National Housing Corporation. That the Respondent issued the applicant with eviction notice dated 27th January 2017 alleging breach of contract. The Applicant also avers that the Respondent has issued a general notice to the tenants of Khadija estate citing intention to bring down the houses and build new ones. That the said notice citing breach of contract is mischievous intended to go around the orders obtained in Petition No 6 of 2017.

3. The application is also supported by the affidavit of the applicant sworn on 9th March 2017. The affidavit annexed the lease agreement dated 1st February 2004 between NHC and the applicant. The applicant further annexed the notice issued by the Respondent and a copy of the order issued on 3rd February 2017.

4. The motion is opposed by the respondent who filed a replying affidavit, preliminary objection dated 30th October 2018 and a further affidavit dated 30th October 2018. The preliminary objection and the further affidavit raised two issues. First that the applicant has been in arrears of rent from 1st February 2017 to 4th June 2018. Secondly that the application has been overtaken by events in light of the Court of Appeal decision in Mombasa Civil Appeal No 46 of 2017 which gave the Respondent green light to proceed with the implementation of the housing project that involves demolishing the plaintiff's residence to pave way for re-development of modern housing units. That as consequence of that decision, this Court is divested of jurisdiction to make any determination regarding the plaintiff's claim. The preliminary objection also stated that the present suit is res judicata as the issues raised herein have been decided upon in **Mombasa Civil Appeal No 46 of 2017 Legal Advice Centre & 2 others vs County Government of Mombasa & 2 others**.

5. The parties filed written submissions and relied wholly on their contents and the pleadings as filed. The plaintiff in her pleadings referred to an order issued in Petition No 6 of 2017 where conservatory orders were issued on 3rd February 2017. In paragraph 12 of the plaint the applicant stated that the subject matter in Petition No 6 of 2017 is the same as the subject matter in this suit. The applicant did not give this Court any explanation why she decided to file a new suit inspite of the pendency of Petition No 6 of 2017. This action by the plaintiff thus

contravenes the provisions of section 6 of the Civil Procedure Act thus is an abuse of the Court process.

6. The applicant filed her written submissions on 13th June 2018 before the Respondent filed a preliminary objection on 31.10.2018 raising the issue of res judicata. The applicant's counsel chose to rely on her pleadings as filed inspite of the objection being raised that this case is res judicata the decision of the Court of Appeal in *Mombasa Civil Appeal No 46 of 2017* whose import divested this Court of jurisdiction to entertain the plaintiff's claim.

7. In her submissions, the defendant at page 5 stated that the Court of Appeal in Civil application No 46 of 2017 exhaustively dealt with the issues raised in the present claim by giving the respondent liberty to proceed with implementation of the housing project. That the consequence of that decision divested this Court of jurisdiction to handle the present claim. The applicant must have been aware of the matter in dispute in Civil Appeal No 46 of 2017 and probably the effect of that finding. Since it is submitted that the finding affects other people which includes the applicant herein this Court cannot try an issue that is already determined by a Court of competent jurisdiction and which Court is higher than this Court.

8. Consequently for the reasons stated I am unable I uphold the objection and the application on its merits for want of res judicata. Instead I do hereby strike out the application together with the suit for contravening the provisions of section 6 (vide Petition No 6 of 2017) and 7 of the Civil Procedure Act. The costs of the application is awarded to the respondent but the suit is struck out with no order as to costs because the defendant had not yet filed a defence to the claim.

Dated, signed & delivered at Mombasa this 15th March 2019

A. OMOLLO

JUDGE