



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

MISC. APPL NO. 12 OF 2019

ABDALLA MOHAMED ABDALLA.....PLAINTIFF

VERSUS

COUNTY GOVT OF MOMBASA.....DEFENDANT

RULING

1. For determination is the Preliminary Objection dated 24th April 2019 raised by the County Government of Mombasa sued as the Respondent. The Preliminary Objection raised the following grounds against the application.

(a) That the entire Miscellaneous Application is defective in law and in substance since it is res judicata as the subject matter and issues raised herein had been heard and determined in Mombasa ELC Case No. 285 of 2015; Abdalla Mohamed Abdalla –versus- the County Government of Mombasa and Mombasa C.A No. 114 of 2018; Abdalla Mohamed Abdalla –versus- the County Government of Mombasa whereof judgement in both matters were delivered on the 24th April 2018 and 7th March, 2019 respectively.

(b) That the application is bad in law, sham and incompetent and fatally defective as the prayers sought cannot be made in a Miscellaneous Application.

(c) That the entire Miscellaneous Application and Notice of Motion Application date 4th April 2019 is incompetent and ought to be struck out with costs.

2. The parties opted to argue the Preliminary Objection by filing of written submissions, supported by case law.

3. The Applicant is his Notice of Motion dated 4th April 2019 sought the following reliefs;

(a) Spent.

(b) That leave be and is hereby granted to the ex parte applicant to secure the premises referred to as;

(i) Mombasa Block XVI/583

(ii) Mombasa Block XVI/598

(iii) Mombasa Block XVI/606

(iv) Mombasa Block XVI/607

(v) Mombasa Block XVI/608

(vi) Mombasa Block XVI/5609

(c) That the orders subject of prayer/item no. 2 hereinabove be served upon both;

(i) The Respondent for purposes of providing security and supervision.

(ii) The OCS, Central Police Station for purposes of ensuring compliance, supervising the execution of the order, providing security, and ensure no public disturbance ensues, whilst maintaining law and order thought out and after the execution of the order.

(d) That the costs of this application be provided for.

4. The Respondent submitted that in the judgment of Yano J in Mombasa ELC Case No. 285 of 2015 between the same parties herein, the Judge found that the suit properties remain the properties of the plaintiff and he is still utilising them as before to access his other properties. The judge noted that although the construction of the road by the defendant on the suit properties would amount to an act of continuing trespass, the plaintiff in his view had suffered no loss or damage. The applicant appealed this decision and the learned Judges upheld the decision of the ELC passed on 24th April 2018

5. The Respondent continued that the applicability of res judicata is provided for in Section 7 of the Civil Procedure Act. That in this case, the parties in the former suit were exactly the same as this suit. Further that securing the applicant's properties as sought in this application was at all material times privy and in existence to the Applicant and there is no reason why the Applicant did not enjoy the issue in the earlier suit. In support of this submission, the Respondent relied on the decision of **Nairobi Civil Appeal No 80 of 1988; Pop-in (Kenya) Ltd & 3 Others –versus- Habits Bank AG Zurich (1990) eKLR.**

6. In reply the Applicant paraphrased the contents of Section 7 of the Civil Procedure Act together with the explanations nos 1-3 given thereunder. He further quoted the observation made in the English case of **Henderson –versus- Henderson (1843-60) All E.R 378** which stated thus;

“.. 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 re judicata applies, 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 judgement, 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..”

7. Mr. Ngonze, learned counsel for the Applicant proceeded to rely also in the case of **ANM –versus- PMN (2016) eKLR** where Muigai, J, observed that the improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse issues therefore the practice should stop..” That this application only seeks to secure the suit premises with a perimeter fence and the said leave sought is a formality save that there is public use now attributed to the premises. He urged the court to dismiss the objection.

8. It is not disputed that the former suit no 285 of 2015 was between same parties as the current suit. The former suit was also determined on its merits by a court of competent jurisdiction. Explanation number 4 of section 7 provides this **“Any matter which might and ought to have been made a ground of defence or attack in a former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”**

9. In the case of Henderson –versus- Henderson cited by the Applicant the court noted that **“the court requires the parties to that litigation to bring forward their whole case and will not 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 the contest.. but not brought forward because of negligence, inadvertence or even accident.”**

10. Since the parties are the same and subject matter is the same, the Applicant has not submitted on why he did not bring the issue of securing the suit properties in the former suit. He wants to be allowed to litigate his case in piecemeal. Mr Ngonze in oral submissions stated that had they succeeded in the former suit, the present application would not have been necessary thus confirming the piecemeal approach. He also said that the Henderson case provided for exceptions but failed to address this court why he believes the Applicant's cause ought to be excluded from the application of res judicata.

11. The Applicant also submitted that the Preliminary Objection raised herein did not meet the test in the **Mukisa Biscuits –versus- West End Distributors Ltd.** However the Applicant has himself annexed the pleadings from ELC case no 285 of 2015 as well as the Judgement both from this court and the Court of Appeal which confirms that there was a former suit between same parties touching on same subject matter. The Applicant failed to address this court why the subject matter contained in this application was not enjoined in the former suit and Section 7 is worded in mandatory terms.

12. I am therefore satisfied that the ground of res judicata has been proved. I will therefore not delve into ground (b) & (c) of the Preliminary Objection. Accordingly I uphold that this application is res judicata and is hereby struck out with costs to the Respondent.

Dated, Signed and Delivered at Mombasa this 31st day of July 2019.

A. OMOLLO

JUDGE