



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MOMBASA**

**ELC APPEAL NO. 21 OF 2018**

**ANGELINA KALAMBA MWASI & 5 OTHERS.....APPLICANTS**

**VERSUS**

**MBARUK AYUB ALI MBARUK.....RESPONDENT**

**RULING**

1. The appellants/applicants filed the application dated 12<sup>th</sup> November 2018 under the provisions of Order 40, 42 and 51 of the Civil Procedure Rules and Sections 1A, 1B & 3A of the Civil Procedure Act. The applicants prays or orders that;

**(a) Spent;**

**(b) Spent;**

**(c) Spent;**

**(d) An order of injunction restraining the respondents by themselves, their agents, and or servants from evicting, selling, transferring, leasing, subdividing, constructing on, registering transfer of the suit property or any subdivision thereof of in any other manner howsoever dealing with the property known as L.R 211/II/MN or any subdivision there of pending determination of the intended appeal.**

**(e) Any other order to protect the suit property known as L.R 211/II/MN or to project the right of appeal as the court may deem fit and just in the circumstances.**

**(f) Costs.**

2. The motion is premised on the grounds stated on its face and the affidavit sworn by Lamada Tabu Muna Mwasi on 12<sup>th</sup> November 2018.

3. The application is opposed by the Respondent's replying affidavit sworn on 17<sup>th</sup> December 2018 and grounds of opposition dated same day. The respondent deposes that the application has been brought in bad faith. The respondent pleads that this application is re judicata the application already determined in **ELC Misc No. 14 of 2018** and **ELC Misc No. 3 of 2018**. He proceeded to annex the said ruling as annexure "**MI**". The respondent also deposed that if the applicants are willing and ready to furnish a suitable security then they should furnish security in the sum of Kshs3 million which includes the purchase price, damages and costs.

4. Only the respondent filed written submissions on 8<sup>th</sup> March 2019. The time was extended for the applicants to file their submissions within 7 days from 11<sup>th</sup> March 2019 but none was filed. The applicants have thus not addressed the court on the issue that their application is res judicata. As it is, I will consider whether it is res judicata before I consider the application on merits.

5. The doctrine of Res Judicata is provided for under Section 7 of the Civil Procedure Act as herein under;

**"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.**

6. This court was moved by the present applicants in **Misc Civil Application No. 14 of 2018** seeking orders of stay of execution of the Judgement/Decree of Hon. Ms. L. T Lewa SRM delivered on 19<sup>th</sup> February 2018 pending hearing and final determination of the appeal to be

lodged in the High Court. The application was determined on merits and a ruling delivered on 20<sup>th</sup> July 2018 with the result that the application was dismissed with costs.

7. By the time the current application was filed, the appellants/applicants were aware of the outcome of their previous application yet they made no reference to it. Are the orders sought in the current application similar and or could have been canvassed in the previous application? The orders herein sought are for injunction restraining the respondent from selling, evicting and or constructing on the suit property pending the hearing and determination of an intended appeal. Prayer 5 of the motion urged the court to issue any other order to protect the suit property to protect that right of appeal.

8. Although the application does not include the prayer for stay, I find it to be res judicata the ruling of 20<sup>th</sup> July 2018 in two respects. First that nothing stopped the applicants from including the prayer for injunction in the previous application. Infact the applicants are guilty of mischief for filing two similar applications in two separate courts to wit the ELC and the High Court. This application was only transferred to the ELC from the High Court. The applicants intended to obtain different orders which action amounts to a gross abuse of the court process.

9. The second reason why the current application is res judicata is that the applicants are seeking orders intended at staying the execution of the judgement being appealed from. The court already rendered itself over the same and unless the court is differently moved, if I proceed to determine the application as presented, it is equivalent to me sitting on appeal on my own earlier decision.

10. Consequently in light of the above analysis, I find the current motion dated 12<sup>th</sup> November 2018 is res judicata. I do hereby strike it out with costs to the Respondent.

**Dated, Signed and Delivered at Mombasa this 23<sup>rd</sup> day of July 2019.**

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**A. OMOLLO**

**JUDGE.**