



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 152 OF 2017

(FORMERLY HCCC 35 OF 2014)

NANDLAL JIVRAJ SHAH

VIMAL NANDLAL SHAH

MEHUL NANDLAL SHAH (all trading as)

JIVACO AGENCIES.....PLAINTIFFS/RESPONDENTS

-VERSUS-

KINGFISHER AGENCIES.....DEFENDANT/APPLICANT

RULING

1. For determination is the application dated 11th April 2017 brought under the provisions of section 1A, 1B & 7 of the Civil Procedure Act and Order 2 rule 15 (1) (b) – (d) of the Rules and the defendant/applicant seeks for orders:

i. The plaintiffs' suit be struck out with costs.

ii. Costs be awarded to defendant.

2. The motion is premised on the grounds on the face of it inter alia that the issues raised in this suit have already been substantially raised in High Court Civil case No 6 of 2011 which case has been determined vide a ruling delivered on 23.8.13 and 20.3.2014.

3. The plaintiffs/Respondents imposing the motion filed in a replying affidavit dated 23.5.2017 and sworn by Mehul Nandlal Shah. Mr Mehul admitted the existence of the previous suit No HCCC 6 of 2011 between the same parties but deposes that the facts in issue are substantially different thus this suit cannot be res judicata. The plaintiffs have set out what was in issue in the former suit at paragraph 5 of his replying affidavit. They urged the Court not to strike out their present suit.

4. The meaning of res judicata is clearly set out under section 7 of the Civil Procedure Act. In the current suit, the Plaintiffs/Respondents have sought the following reliefs:

1. Special damages of Ksh 19,375,000/= as outlined above.

2. Damages for trespass, wrongful seizure and conversion and psychological trauma, loss of business and illegal distress of the plaintiffs' goods.

3. Exemplary Damages for the mental cruelty and suffering that the Plaintiffs suffered.

4. Costs and interest.

5. At paragraph 13 of the plaint, the Plaintiffs/Respondents have pleaded thus "the actions of the defendant were wrong, illegal and amount to detime, conversion and illegal distress

Particulars of illegal distress

- i. The decree had not been perfected by this date
- ii. Taxation of costs had not taken place.
- iii. The defendant had not applied for a warrant of eviction against the plaintiffs.
- iv. No Court bailiff was involved making the action utterly illegal.”

6. In Civil Case No 6 of 2011, the plaintiffs were the same except the current plaintiffs were sued as defendants. In the former suit, the plaintiff (now defendant/applicant) sought for judgment for:

a. Kshs 232,000 plus mesne profits.

b. Kshs 46,400 from 3rd July 2010 till defendant vacate property Manyara Building.

The applicant got judgment as prayed and proceeded to execute on the 20th September 2013. It is this execution that generated the cause of action in the present suit.

7. The question for the Court to determine is whether the plaintiffs herein had a right to commence a fresh suit under a separate number or such an action is res judicata and or abuse of the Court process. In his written submissions filed in Court on 2.10.2017, the defendant/applicant submits that the illegality around how possession was obtained was canvassed in the application for stay of execution in the former suit and that the Court found no merit on the alleged illegality.

8. The Respondents on their part submit that the causes of action are different as they are seeking compensation for the unlawful and/or attempted eviction. That res judicata cannot be used to sanction illegalities. That the issue of illegality arose only after the irregular and illegal attempted eviction making it a fresh issue. The Respondents buttressed their submission citing the case of **Equitorial Commercial Bank Ltd vs Jodam Engineering Works Ltd & 2 others (2014) eKLR and Mistry Sing vs Kulubya (1963) E A 408.**

9. From the pleadings and the submissions, it is not in dispute that the Plaintiffs/Respondents cause of action herein was occasioned by what they term as an illegal execution of the decree obtained in HCCC No 6 of 2011. That during that execution process, their properties were destroyed, they suffered mental anguish and loss as particularised in the plaint before Court.

10. Under section 34 of the Civil Procedure Act, it is provided thus;

“34(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional Court fees.

Explanation: - For the purpose of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.”

11. Section 34 (1) above bars the filing of a separate suit where the question arising for determination relates to execution, discharge or satisfaction of a decree. Under subsection (2) it allows the Court issuing the decree to treat the proceedings under this section as a suit and the Court may even order the payment of additional Court fees where necessary.

12. In my understanding of section 34 of Civil Procedure Act, the plaintiffs herein were required to bring this claim under the same suit since the cause of action was a consequence of execution of a decree. For this one reason I agree with the defendant/applicant that the present suit is frivolous and an abuse of the Court process.

13. Further, I have looked at the ruling rendered by Kasango J. in HCCC No 6 of 2011 on 20.4.2014. At paragraph 4 in page 2, the Judge noted one of the grounds relied on by the plaintiffs herein for seeking stay of execution as, “*that the plaintiff executed the aforesaid judgment on 20.9.2013 when a group of 30 people removed the defendant’s goods from the premises and in the process destroyed many of them.*” The defendant by their sworn affidavit of Mehul Nandlal Shah deposed as follows:

6. That the decree had not been perfected at all, nor have I been served with any warrants either of attachment or eviction.

7. That the capricious acts of the plaintiff have completely destroyed the defendant’s business and I am particularly worried about crucial documents that the so called auctioneers destroyed.

14. The Judge in paragraph 5 of her ruling found that the defendants did not provide information how the business was destroyed or how it would suffer further loss if the stay order was not granted. She proceeded to dismiss that application for failing to meet the threshold of Order 42 Rule 6. The issue of destruction of the business was within the knowledge of the Respondents while former suit was still active

before the Judge that issued the decree. The law required them to pursue this claim in that same suit.

15. In explanation 5 of Section 7 of the Civil Procedure Act, any relief claimed in a suit which is not expressly granted by the decree shall be deemed to have been refused. In relating this explanation to the matter before me, the Judge in the former suit having found that the Respondents had failed to provide information on how the business had been destroyed had in effect found that there was no illegality and or loss suffered in the execution of the decree. If the Respondents were unhappy by this finding, their avenue to follow was lodge an appeal against that decision. By bringing a fresh claim seeking compensation pursuant to the execution of decree in the former suit in my view is asking this Court to sit on appeal or a decree issued by a Court of concurrent jurisdiction. This Court is not bestowed powers to hear this fresh claim. Consequently I do find on this ground this suit must fail under the grounds set out under Order 2 rule 15 (1) (b) – (d) of the Civil Procedure Rules.

16. In light of the foregoing, I reach a finding that the application dated 11.4.2017 is merited. The same is allowed. The result is that the plaintiffs' suit be and is hereby struck out with costs to the defendant/applicant. I also award them costs of this application.

Dated, signed & delivered at Mombasa this 25th day of July 2018

A. OMOLLO

JUDGE