



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**

**ELC MISC NO.15 OF 2018**

**FRANCIS KIHORO KIBOTHI**

**C/O OF GIKANDI & ADVOCATES.....APPLICANT**

**-VS-**

**CATHERINE KAGENDO MBUNA.....RESPONDENT**

**RULING**

1. By a Notice of Motion dated 5<sup>th</sup> March, 2018, the Applicant seeks orders:

**1. THAT this matter be certified as urgent**

**2. THAT pending the hearing and determination of this application inter parties, the existing status quo, being that the Applicant is in occupation of the house standing on the plot of land known as Plot No. 2192 Bombolulu as a servant of the Respondent at a monthly rent of Kshs.7,000 be maintained.**

**3. THAT pending the hearing and determination of the Application dated 16<sup>th</sup> November, 2015 filed herein on 16<sup>th</sup> November 2015, the existing status quo, being that the Appellant is in occupation of the house standing on the plot of land known as plot No. 2192 Bombolulu as a tenant of the Respondent at a monthly rent of Kshs.7,000 be maintained.**

**4. THAT costs of this Application be in the cause.**

2. The Application is based on the grounds on the face of the motion namely:

**1. THAT on 16<sup>th</sup> November, 2015 the Applicant filed Mombasa Misc. Civil Application No.344 of 2015 seeking, inter alia, to enlarge the prescribed time to file an appeal from the judgment delivered by the Business Premises Rent Tribunal in Tribunal Case No.68 and 69 of 2014, Mombasa on 19<sup>th</sup> June 2015.**

**2. THAT on 8<sup>th</sup> February 2016 the court granted the Applicant ex-parte orders to inter alia, enlarge the prescribed time to file an appeal from the judgment delivered by the Business Premises Rent Tribunal in Tribunal Case No.68 and 69 of 2014, Mombasa on 19<sup>th</sup> June 2015.**

**3. THAT thereafter the Applicant filed Civil Appeal No.12 of 2016; Francis Kihoro Kibotho –vs- Catherine Kagendo Mbuna.**

**4. THAT on 15<sup>th</sup> July, 2016 the court in Civil Appeal No.12 of 2016; Francis Kihoro Kibotho – vs – Catherine Kagendo Mbuna set aside the aforesaid ex-parte orders issued on 8<sup>th</sup> February, 2016.**

**5. THAT the Applicant/Tenant was aggrieved by the said ruling and filed Court of Appeal Civil Appeal No. (sic) Francis Kihoro Kibothu – v – Catherine Kagendo Mbuna whereby on 15<sup>th</sup> February, 2018 the Court of Appeal dismissed the said appeal.**

**6. THAT it is now necessary that the Application dated 16<sup>th</sup> November, 2015, whereby the court had issued the aforesaid ex-parte orders, be listed for hearing inter-partes on an urgent basis.**

**7. THAT there is an imminent threat that the respondent will evict the Applicant any time now. As such, it is necessary that urgent conservatory orders be issued by this court so as to ensure that the subject matter of this application is not interfered with.**

**8. THAT unless this court grant an order for the maintenance of the existing status quo, the Applicant is likely to be evicted from the suit premises whereby the Application dated 16<sup>th</sup> November 2015 shall be rendered nugatory. Further, the Applicant will suffer irreparable losses as he shall be evicted from the suit property while he carries on his business and this sustains his family when his fundamental right to prefer an appeal from the Tribunal's decision will forever have been compromised though no fault of the Applicant as the Applicant should not be punished on account of his advocates mistakes.**

**9. THAT there will be no prejudice caused to the Respondent if this Application is allowed.**

3. The Application is also supported by the affidavit of Francis Kihoro Kibothu sworn on 8<sup>th</sup> March, 2018, reiterating mainly the grounds above mentioned.

4. The Application is opposed by the Respondent who filed a Replying Affidavit sworn by herself on 27<sup>th</sup> March, 2018. The Respondent also filed a Preliminary Objection dated 27<sup>th</sup> March 2018 but which was withdrawn on 9<sup>th</sup> April 2018. The Respondent deposed inter alia, that the application is res judicata and an abuse of the court process. That there is no pending application as per prayer 3 in the motion and that if it is pending, the Applicant ought to have fixed it for hearing and not file a new Application. That the court having discharged the orders granted on 8<sup>th</sup> February 2016 the alleged application being **Misc. Application No.344 of 2015** was dispensed with. That vide ruling dated 15<sup>th</sup> July, 2016, the court gave the Applicant a chance to revisit **HC Misc. Application No.344 of 2015** but the Applicant filed **Civil Appeal No. 28 of 2017** which was dismissed. That the Applicant has approached the court with unclean hands as he is in rent arrears as he never complied with the court's conditions for stay.

5. The Application was canvassed by way of written submissions which were also highlighted by the advocates for the parties. They also relied on various authorities.

6. I have considered the Application, the affidavits on record, the rival submissions and the authorities placed before me. The Application is seeking maintenance of the status quo pending the hearing and determination of the Applicant's Application dated 16<sup>th</sup> November 2015. I have perused the court record and note that there is no application dated 16<sup>th</sup> November 2015. However, there is an application dated 30<sup>th</sup> October 2015 but filed on 16<sup>th</sup> November 2015. The same was filed under certificate of urgency and the certificate of urgency is dated 16<sup>th</sup> November 2015. The record shows that on 8<sup>th</sup> February 2016, the said Application came up for hearing before court. After hearing Mr. Gikandi counsel for the Applicant and in the absence of the Respondent who the court noted was duly served, allowed the application on certain terms. The matter ended up in the court of Appeal vide **Civil Appeal No.28 of 2017** as clearly captured by the annexure marked "KK 3" in the affidavit in support of the Application.

7. Section 7 of the Civil Procedure Act provides as follows:

***7. "No court shall try any suit in which the matter is directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties unclear whom they or nay of them claim, litigating under the same title, in court competent to try such subsequent suit or suit in which such issue has been subsequently raised, and has been heard and finally decided by such court"***

8. Section 28 of the Environment and Land Court Act also bars the court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction. The essential ingredients of the doctrine of res judicata have been expounded in many cases. See for example, **Bernard Mugo Ndegwa – v- James Nderitu Githae & 2 Others (2010)eKLR, Nancy Mwangi t/a Worhtin Marketers – v – Airtel Network (K)Ltd (formerly Celtel Kenya Ltd) & 2 Others (2014)eKLR, Kamunye & Others –vs- Pioneer General Assurance society Ltd (1971) EA 263; John Florence Maritime Services Ltd & Another – v- Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR, and MWK – v- AMW (2016) eKLR.** It has also been stated that the principle applies to applications with the same force whether the application be final or interlocutory.

9. Having looked at the court records, I find that the application filed on 16<sup>th</sup> November 2015 has been dispensed with. The same is not pending as alleged by the applicant. In my view, granting the orders herein will be in vain. The court does not make orders in vain. Revisiting the application filed on 16<sup>th</sup> November 2015 in my view will be against the doctrine of res judicata. The statutory provisions under Section 7 of the Civil Procedure Act is clear and bars a court from hearing a suit or issue if the same was substantially in issue in a former suit between the same parties, if the issue was determined in a former suit after hearing. In this application, the applicant is seeking an order for status quo to be maintained pending the hearing and determination filed on 16<sup>th</sup> November 2016. Since I have found that that application has been determined granting the orders sought in this application will serve no purposes. Even the appeal itself was struck out.

10. By reason of the foregoing, I find that the Notice of Motion dated 5<sup>th</sup> March 2018 is an abuse of the court process. The same is dismissed with costs.

**Delivered, signed and dated at Mombasa this 20<sup>th</sup> September, 2018.**

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**C. YANO**

**JUDGE**