



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 34 OF 2013

ISAAC MAINA KAMAU.....PLAINTIFF

VERSUS

RAHAB WANGARE GACHIENGO.....1ST DEFENDANT

NAOMI WAMBUI GACHIENGO.....2ND DEFENDANT

(Both sued as Administrators of the state of HARUN GACHIENGO KAMAU deceased)

RULING

1. The 2nd defendant filed Notice of Motion dated 31st October 2017 seeking the following orders:

1. The application be certified urgent and fit to be heard on a priority basis.

2. That the Auctioneers M/s Cleverline Auctioneers be stopped by an order of this court from selling the proclaimed 2nd defendant's /applicant's house hold goods pending the hearing and determination of this application.

3. That there be a stay of execution of the decree herein and all consequential orders be stayed pending the hearing and determination of Nakuru Appeal No. 50 of 2017.

2. The application was supported by an affidavit sworn by the 2nd defendant. she deposed that she had filed an application in the Court of Appeal being Application No. 50 of 2017 Nakuru seeking extension of time within which to lodge Notice of Appeal and that the matter is pending determination in the Court of appeal. That M/s Cleverline Auctioneers proclaimed her household goods on 2nd October 2017 and that unless the auctioneer is stopped, she will suffer irreparable damage.

3. The 1st defendant responded to the application by filing Notice of Preliminary Objection by filing Notice of Preliminary Objection dated 11th January 2018. The objection is on the following grounds:

1. The Notice of Motion dated 31st October 2017 is res judicata the applicant having earlier filed Notice of Motion dated 7th July 2014 which sought similar prayers and which was dismissed on 30th January 2015.

2. The application is unsustainably defective and unmaintainable in law.

4. This ruling is in respect of the aforesaid preliminary objection.

5. At the hearing of the objection, Mr Wachira learned counsel for the 1st defendant submitted that: the application is res judicata since the applicant had earlier filed a similar application dated 7th July 2014 seeking similar prayers. The application was dismissed on 30th January 2015. He therefore argued that the current application contravenes Section 7 of the Civil Procedure Act.

6. Counsel for the plaintiff associated herself with Mr Wachira's submissions.

7. I have considered the preliminary objection and the submissions thereon. *Res judicata* has a statutory foundation in **Section 7** of the **Civil Procedure Act**. The said section provides:

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.

8. An application is also deemed to be a suit since “suit” since is defined at **section 2** the Act to mean “***all civil proceedings commenced in any manner prescribed***”. For *res judicata* to apply, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit.

9. The Court of Appeal had the following to say as regards the provisions of **Section 7** of the **Civil Procedure Act** in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**:

... the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally...

10. The present application essentially seeks stay pending hearing and determination of an application in the Court of Appeal pursuant to which the applicant seeks enlargement of time to file Notice of Appeal in respect of the judgment delivered herein on 9th May 2014. For all intents and purposes, it is an application for stay pending appeal to the Court of Appeal.

11. The record herein shows that the applicant filed Notice of Motion dated 8th July 2014 in this very suit in which she sought stay of execution of the decree herein pending hearing of an intended appeal to the Court of Appeal. The application was heard before L.N. Waithaka J. The judge found that the application lacked merit and dismissed it in a ruling dated 30th January 2015. Consequently, the issue of whether or not the applicant is entitled to stay pending appeal has been conclusively determined and is *res judicata*. The preliminary objection is therefore upheld.

12. Notice of Motion dated 31st October 2017 is struck out with costs to the plaintiff and the 1st defendant.

Dated, signed and delivered in open court at Nakuru this 14th day of December 2018.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff/respondent

Mrs Oliech holding brief for Mr Wachira for the 1st defendant/respondent

No appearance for the 2nd defendant/respondent

Court Assistants: Gichaba & Lotkomoi