



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. NO. 515 OF 2013

JULIA ODHIAMBO OGINA.....PLAINTIFF

VERSUS

ADNDREW HORACE O. OMONDI.....DEFENDANT

RULING

Coming before me for determination is the Plaintiff/Applicant's Notice of Motion dated 29th April 2013 (hereinafter referred to as the "present Application") in which the Plaintiff/Applicant is seeking for the following orders:

1. Spent
2. That the Defendant by himself, his servants, agents, employees or any entity acting under him be restrained by an interim injunction from evicting tenants, collecting rent, leasing, renting out, entering upon, trespassing, charging, mortgaging, selling, transferring, transacting, disposing, taking control or possession or dealing in any way with Flat Number MF 41/G, Madaraka estate, the suit property herein, until the hearing and determination of this Application.
3. That the Defendant by himself, his servants, agents, employees or any entity acting under him be restrained by an interim injunction from evicting tenants, collecting rent, leasing, renting out, entering upon, trespassing, charging, mortgaging, selling, transferring, transacting, disposing, taking control or possession or dealing in any way with Flat Number MF 41/G, Madaraka estate, the suit property herein, until the hearing and determination of this suit.
4. Pending hearing hereof, the status quo as regards the suit property be maintained.
5. The costs of this Application be provided for.

The present Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Julia Adhiambo Oguya, sworn on 29th April 2013.

The present Application is contested. The Defendant filed his Replying Affidavit sworn on 20th May 2013 and his Preliminary Objection dated 20th May 2013 in which the Defendant stated that the issues canvassed in support of the present Application are res judicata, the same having been directly and substantially in issue between, inter alia, the same parties herein in an earlier application dated 14th June 2012 (hereinafter referred to as the "previous Application").

Both the Plaintiff and the Defendant filed their written submission which have been read and considered

by this court.

The pertinent issue that I need to address is the Preliminary Objection raised by the Defendant namely whether the present Application is res judicata owing to the previous Application which was dismissed by this court.

The previous Application brought by the Plaintiff/Applicant sought for the following orders:

1. Spent.
2. The Defendant by himself, his servants, agents, employees and otherwise howsoever be restrained by an interim injunction from evicting tenants, collecting rent, renting out, leasing, entering upon, trespassing, charging, mortgaging, selling, transferring, transacting, disposing, alienating, taking possession or control, dealing in any way whatsoever with Flat Number MF 41/G, Madaraka estate, the suit property herein, pending the hearing and determination of the application and/or until further orders are issued by the Honorable court.
3. The Defendant by himself, his servants, agents, employees and otherwise howsoever be restrained by an interim injunction from evicting tenants, collecting rent, renting out, leasing, entering upon, trespassing, charging, mortgaging, selling, transferring, transacting, disposing, alienating, taking possession or control, dealing in any way whatsoever with Flat Number MF 41/G, Madaraka estate, the suit property herein, pending the hearing and determination of this suit.
4. Pending the hearing hereof the status quo be maintained.
5. The costs of this application be provided for.

The law pertaining to the doctrine of res judicata is captured under the provision of **Section 7** of the **Civil Procedure Act** which provides as follows-

“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.”

A comparison of the prayers sought by the Plaintiff in the present Application as outlined above are clearly a duplicate of the prayers sought in the previous Application also set out above. It is not in dispute that the previous Application was dismissed by Justice Odunga on 29th January 2013. The Plaintiff has neither appealed that dismissal neither has she sought a review. While the above legal provision seems to address similar suits as opposed to similar applications as in this matter, the following decision sheds light on whether interlocutory findings on matters of fact will constitute res judicata where a similar application is filed in the future. This is what the Court of Appeal had in mind when it held in **Uhuru Highway Development Ltd -Vs- Central Bank Of Kenya & 2 Others Civil Appeal No. 36 of 1996** that,

“There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature That is to say, there must be an end to applications of similar nature: that is to say further, wider principles of res judicata apply to applications within the suit.”

The reasoning of this decision is clear. If there was no bar to filing of related applications, the courts would be swamped with similar applications, or applications raising same or similar issues. There would be no end to this, defeating the cardinal principle of justice that there must be an end to litigation. As far as the present Application is concerned, I find that the very issues raised in it were conclusively determined by Justice Odunga in the previous Application.

For the reasons that I have outlined above, I find the Preliminary Objection dated 20th May 2013 by the Defendant as merited and I uphold the same. I therefore find the present Application to be *res judicata*

and do hereby dismiss it with costs to the Defendant.

It is so ordered.

SIGNED AND DELIVERED AT NAIROBI THIS 21st DAY OF March 2014

MARY M. GITUMBI

JUDGE