



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND DIVISION

ELC NO.874 OF 2012

LILIAN M'MBONE ABABU.....PLAINTIFF

=VERSUS=

NAIROBI AVIATION COLLEGE LTD.....1ST DEFENDANT

MIKE OYOO WAGUNDA.....2ND DEFENDANT

CO-OPERATIVE BANK LTD.....3RD DEFENDANT

COMMISSIONER OF LANDS.....2ND DEFENDANT

RULING:

The matter coming for determination is the Plaintiffs' Notice of Motion dated 11th June, 2014 brought under ***Order 51 Rule (1) of the Civil Procedure Rules, Sections 1, 1A, 3 & 3A of the Civil Procedure Act*** all other enabling provisions of the ***Law*** and ***Article 159 of the Constitution***. The application sought for these Orders.

- a. *That there be a stay of attachments pending hearing and determination of the application dated 26th June, 2013.*
- b. *That the **Status Quo** be maintained pending the hearing and determination of the application dated 26th June, 2013.*
- c. *That costs of the application be provided for.*

The application was premised on the grounds set on the face of the application and also on the annexed affidavit of ***Lilian M'mbone Ababu***. These grounds are:-

- a. *That the suit was filed under certificate of urgency on 22nd November, 2012 and she was granted interim order which were to be in force pending the hearing of the application.*
- b. *That further the matter came up for hearing on 5th December, 2012 but the same was not listed and the interim orders lapsed.*
- c. *That the 1st Defendant then moved to proclaim her properties and she instituted an objection*

proceedings which was later dismissed.

- d. *That failure to prosecute the application dated 26th June, 2013 was due to the confusion caused by the matter not being listed on 5th December 2012.*
- e. *That the 1st Defendant has now instructed auctioneers to levy distress for rent on the Plaintiff yet she is not a tenant.*

In her supporting Affidavit, the applicant **Lilian M'Mbone Ababu**, averred that the 1st Defendant has now instructed auctioneers to levy distress for rent against her yet she is not a tenant of the 1st Defendant nor does there exist a tenancy agreement between them to warrant the levying of distress. It was her contention that the distress is unlawful and illegal and the court should not allow it to proceed. Further that if the distress is allowed to proceed, the amended application dated 26th June, 2013 will be rendered nugatory and she will have no recourse to protect her property which might have been attached while the application is still pending.

The application is contested. The 1st Defendant filed grounds of opposition and averred that this honourable court cannot make Orders of stay of execution when there is a no appeal in place as the Civil Procedure Rules envisages the filing of appeal and the existence of an order and/or a decree before any orders of stay are granted; further that there cannot be stay of execution in a vacuum as there are no orders of stay prayed for in the application dated 26th June 2013. In addition, pursuant to the ruling delivered by the honourable Court on 23rd May 2014 and the resulting orders, the applicant offends the mandatory provisions of **Section 7** of the **Civil Procedure Act** in that the main orders of stay sought in the present application were dealt with and denied in the application dated 8th July, 2012; therefore this application has the main object of unjustly denying the Respondent its rights over the property subject matter herein.

The parties herein canvassed this Notice of Motion by way of written submissions. I have now carefully considered the said Notice of Motion and the written submissions and I make the following findings.

The applicant has brought this application under **Sections 1A, 3 and 3A of the Civil Procedure Act**. **Section 1A** deals with the overriding objective of this Act and Rules which is to facilitate the just, expeditious, proportionate and affordable resolution of the Civil Disputes governed by the **Act**.

Further **Section 3A** deals with the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court.

From the Courts record, it is apparent that the applicant filed this suit on 22nd November, 2012. The applicant also filed a Notice of Motion seeking for injunctive Orders. Interim Orders were issued but they lapsed after 5th December, 2012.

The applicant further filed an amended Notice of Motion on 26th June 2013 and sought for injunctive relief. However, before she could prosecute the application dated 26th June, 2013 she filed another Notice of Motion dated 8th July, 2013 and sought for stay of execution of the attachment pending the hearing of the application dated 26th June, 2013. This application dated 8th July, 2013 was contested. The Court eventually issued a Ruling on 23rd May 2014 and dismissed the above stated application.

Thereafter the applicant brought this application where she is seeking stay of attachment and maintenance of **Status Quo**.

The 1st Respondent has opposed the said application and submitted that the issues raised in the instant application are basically the same issues that were raised and determined by the court vide its Ruling of 23rd May 2014. The 1st Defendant submitted that the application herein is **Res-Judicata** and

should be dismissed. 1st Defendant relied on the case of **Julie Ogina Vs Horace Omondi (2014) eklr.**

The applicant submitted that this application is not res-judicata as she seeks for orders of status Quo which had not been prayed for in the Notice of Motion decided on 23rd May, 2014. Further that this court had stated in its ruling of 23rd May, 2014 that the pending application should be pursued instead of filing a fresh application on the same matter.

The applicant further submitted that in my Ruling of 23rd May, 2014, relied on part of section 26(1) of the Land Registration Act and concluded that the suit property belongs to the 1st Defendant. The submissions by the applicant shows that she was dissatisfied with the Courts Ruling. Then the best recourse would have been to invoke the appellate jurisdiction. The court was clear that the ***Certificate of Title*** was only a ***prima facie*** evidence. The said title is subject to challenge on the grounds stated in section 26 of the Land Registration Act.

The applicant herein filed an amended Notice of Motion dated 26th June, 2013. In the said Notice of Motion, the applicant has sought for injunction barring the Defendants from attaching her movable assets. That is the application that the applicant should expedite so that the issues in disputes are resolved expeditiously and then the issue of who owns the suit property is determined. In this Notice of Motion the applicant has sought for stay of attachment pending the hearing and determination of the application dated 26th June, 2013.

In the application dated 8th July, 2013 the applicant had sought for **stay** of execution of the attachment pending hearing and determination of the application dated 26th June 2013. The Court dismissed the said application. The applicant herein has prayed for the same prayers that were prayed for in Notice of Motion dated 8th July, 2013. The 1st Respondent has submitted that this application is Res-judicata and the applicant submitted that the same is not Res-judicata.

I have considered the prayers sought by the applicant in the instant application and the prayers in the Notice of Motion dated 8th July, 2013 and I find that they are clearly the same. The previous application was dismissed by this court on 23rd May, 2014. The plaintiff has neither appealed that dismissal nor sought for a review. I

In the case of **Uhuru Highway Development Ltd Vs Central Bank of Kenya & 2 Others , Civil Appeal No.36 of 1996**, the Court of Appeal held that interlocutory findings will also constitute res-judicata were a similar application is filed in future. It was held as thus:-

“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 re hearing. This shows only one intention on the part of the legislature....” That is to say, there must be an end to application of similar nature” that is to say further, wide principles of res-judication apply to application within the suits”.

From the above holding by the Court of Appeal, there is no doubt that all the provisions of Section 7 of the Civil Procedure Act relating to Res-judicata in regard to suits do apply to interlocutory application. The reasoning is that there must be an end to application of similar nature since if there is no bar to filing of related applications, the court would be crowded with similar applications or applications raising same or similar issues. There would be no end to litigation and that would defeat the cardinal principle that there must be an end to litigation.

Having considered the instant applications, I find that similar issues were raised and were conclusively determined in the previous application dated 8th July, 2013. I will further reiterate that the applicant should set the Notice of Motion dated 26th June, 2013 down for hearing expeditiously so that the Court can determine the issues raised therein.

For the above reasons, the Court finds that this application is res-judicata and I uphold the 1st

Defendant opposition to the Notice of Motion dated 11th June, 2014. The same is dismissed with costs to the 1st Defendant.

Dated, signed and delivered this 19th day of September 2014

L. GACHERU

JUDGE

19/9/2014

Before Gacheru Judge

Court Clerk : Kamau

Mr Nyangoro also holding brief for Kithi for Plaintiff/Applicant

Mr Mukele for the 1st Defendant.

L.N. GACHERU

JUDGE

Mr. Nyangoro also holding brief for Mr. Mose for 2nd Defendant.

L.N. GACHERU

JUDGE