



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & AZANGALALA, JJ.A)

CIVIL APPEAL NO. 32 OF 1997

BETWEEN

GEORGE GIKUBU MBUTHIA.....1<sup>ST</sup> APPELLANT

LEAH WANJIRU MBUTHIA.....2<sup>ND</sup> APPELLANT

PETER MBUTHIA NJUGUNA.....3<sup>RD</sup> APPELLANT

PALACE INVESTMENT LTD.....4<sup>TH</sup> APPELLANT

AND

SMALL ENTERPRISES FINANCE LTD.....1<sup>ST</sup> RESPONDENT

RECEIVER/MANAGER

PALACE DRYCLEANER LTD.....2<sup>ND</sup> RESPONDENT

*(Appeal from the Ruling of Justice Mbogholi Msagha delivered on 16<sup>th</sup> January, 1997*

*in*

*H.C.C.C. NO. 3088 OF 1994*

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JUDGMENT OF THE COURT

This is an appeal by the 1<sup>st</sup> defendant in the High Court, **George Gikubu Mbuthia**, (“the appellant”) against an order made by **Mbogholi J**, on 16<sup>th</sup> January, 1997 by which order, the learned Judge dismissed the appellant’s application dated 10<sup>th</sup> December, 1996 seeking, *inter alia*, an interlocutory injunction restraining the respondents, then the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs, respectively, from selling or disposing off of the appellant’s property known as **LR No. 36/11/1 Nairobi** (hereinafter “the suit property”) which sale had been scheduled for 13<sup>th</sup> December, 1996. The appellant had also sought the striking out of the respondents’ suit for being scandalous, vexatious, frivolous or otherwise an abuse of the process of the court; and for setting aside proceedings and orders made on 25<sup>th</sup> November, 1996. The latter relief must

be related to proceedings and orders which were made on 15<sup>th</sup> October, 1996 as those are the proceedings and orders which were in respect of the appellant's application dated 24<sup>th</sup> July, 1996 which was dismissed by **Ringera J** as he then was.

**Mboghli J**, dismissed the appellant's aforesaid application on a preliminary objection taken up by counsel for the respondents that the application was *res judicata*. The *res judicata* plea was raised, because the applicant had previously lodged applications dated 24<sup>th</sup> July, 1996, 6<sup>th</sup> November, 1996 and **Court of Appeal Civil Application No. Nai 373 of 1996[NAI 142/96 UR]**. The learned Judge concluded his ruling as follows:-

*“In the present application the applicant has introduced some material to show some prejudice occasioned by the respondent. Those are not new matters as the documents must have been in his possession all along and there is no explanation why they have not featured anywhere in the previous applications.*

*With respect therefore I must as I hereby do, uphold the preliminary point of law and find that this matter is res judicata and should be laid to rest. Any attempt to revive the same amounts to abuse of the process of the court.*

*Accordingly the stay given on 13<sup>th</sup> December, 1996 is vacated and application dated 10<sup>th</sup> December, 1996 dismissed with costs.”*

The appellant was dissatisfied with that order hence this appeal which is premised upon 24 grounds. The appeal was however, canvassed before us by the appellant in person on mainly two grounds namely, that the basis of the threatened sale of the appellant's property was charge document which was defective for non-compliance with **Section 35** of the **Advocates Act** and **Sections 49(4)** and **56(1)** of the **Transfer of Property Act**. In the appellant's view illegal documents could not be the basis of the exercise of statutory power of sale by the respondents.

We have not been informed of the status of the suit before the High Court. In view of that uncertainty, we have no intention of embarking on any analysis of the issues which the trial court is yet to make a determination upon. We shall therefore confine ourselves to the narrow issue of *res judicata* upon which the appellant's application was refused.

The relevant provision relating to *res judicata* is **Section 7** of the **Civil Procedure Act (Cap 21 Laws of Kenya)**, the material part of which provides as follows:

*“7. 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.”*

There are 6 explanations of this principle but for the purpose of the matter before us, explanation 4 is pertinent and reads as follows:-

*“Explanation (4) – Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit”*

It is also now settled that the principle of *res judicata* applies to applications made in suits. See **Uhuru Highway Development Limited -v- Central Bank of Kenya & Others (CA No. 36 of 1996)**. The object of the principle is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter. There is also the policy objective that it is desirable that there

be an end to litigation and that a person should not be vexed twice in respect of the same matter.

In the matter before us, the learned Judge considered that the appellant had been before **Ringera J.**, on 15<sup>th</sup> October, 1996 on an application dated 24<sup>th</sup> July, 1996 in which he principally sought an order of injunction restraining the respondents from selling or disposing of the suit property pending the hearing and determination of the application and the suit. When the application was placed before **Ringera J** on 15<sup>th</sup> October, 1996 the appellant, through his counsel, applied for adjournment which the learned Judge declined. As the application was opposed the learned Judge was persuaded that the interests of justice impelled a dissolution of the interim orders of injunction which had been made on 6<sup>th</sup> August, 1996. He then dismissed the appellant's application as being unmeritorious.

**Mboghli J**, also considered that the appellant, through the firm of **Masore Nyang'au & Company Advocates**, sought to reinstate his dismissed application and the previous orders of injunction. This record does not have the results of that application.

The learned Judge further considered that the appellant made yet another application on 6<sup>th</sup> November, 1996 seeking an order restraining the respondents from selling the suit property pending the hearing and determination of the suit. That application was placed before **Ole Keiwa J.**, as he then was, who dismissed it because, in his view, no *prima facie* case with a probability of success at the trial had been demonstrated.

Being aggrieved by that dismissal, the appellant moved to this Court under **Rule 5(2)(b)** of this Court's Rules. He sought an injunction to restrain the respondents from selling the suit property pending the determination of an intended appeal. After hearing the appellant and counsel for the respondents, the Court held:

***“We have carefully considered the submissions ably made by Mbuthia for the applicants and Mr. Gatonye on behalf of the respondents. We are not persuaded that the appeal is arguable on the grounds urged before us. In any event, we are not satisfied that the appeal will be rendered nugatory if an injunction is not granted. The application is dismissed with costs.*”**

Given the history of the dispute, we are not at all surprised that when the appellant canvassed his application dated 10<sup>th</sup> December, 1996 before **Mboghli, J** on 13<sup>th</sup> December, 1996 the learned Judge concluded that the matter was *res judicata*. The complaints the appellant raised in the application were grounded on documents which had been in the appellant's possession even as he urged the previous applications. The appellant did not rely upon any changed circumstances and there is nothing placed before us to lead us to the conclusion that circumstances had indeed changed. The appellant did not allege a cause of action which did not exist at the time of the previous applications. The challenge made against the charge documents could have been made a ground of attack in the previous applications.

For those reasons we think the learned Judge was right in treating the application as *res judicata*. It is depressing that the applicant is pursuing interlocutory applications and orders made thereon without disclosing the status of the parent suit. We deplore this state of affairs. In our view, the appellant's complaint with regard to the charge documents should be resolved at the hearing of the suit.

We order this appeal be and is hereby dismissed. As neither the respondents nor their counsel attended the Court when this appeal came up for hearing, we make no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF OCTOBER, 2015.**

**M.K. KOOME**

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**JUDGE OF APPEAL**

**H.M. OKWENGU**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*Copy of the original*

**DEPUTY REGISTRAR**