



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NO. E054 OF 2021

(FORMERLY MISC NO. E015 OF 2021)

DAVID R ANDANJE.....APPLICANT

-VERSUS-

NAKURU WATER AND SANITATION SERVICES LIMITED.....RESPONDENT

RULING

1. Before me for determination is the Applicant's application dated 19th August 2019 brought under **Section 3 and 3A of the Civil Procedure Act Cap 21, order 51 rule 1 of the Civil Procedure rules, 2010** and all other enabling provisions of the law sought for the following orders;

1) That this Application be certified urgent and the same be heard on priority basis.

2) That leave be granted to the Applicant DAVID R. ANDANJE to file his suit afresh arising from the unlawful seizure of his house hold goods detained by the respondent and unlawful levying and deduction of rent from his salary even after eviction from the respondent's premises whilst he was an employee of theirs.

3) That the costs of this Application do abide the outcome of the intended suit.

2. The Application is supported by the grounds on the face of the Application and the supporting Affidavit deposed upon by the Applicant David Raphael Andanje on the 19th August, 2019. The Applicant stated that he was employed by the respondent as a casual worker in 1989 and later promoted to the position of water technician. Upon this promotion he was given a company house at Mereroni treatment works staff quarters at Milimani within Nakuru town. He occupied the house until the year 2007 when he was issued with a three-month notice dated 9th October, 2007 to vacate the house. The Notice is annexed as **DA-1**.

3. The Applicant averred that, upon receipt of the letter he approached his superiors for an explanation and the managing director agreed to reconsider the said notice. However, on the 6th February 2008 he received another letter requiring him to vacate the Respondent house within 7 days when he was still an employee of the Respondent. Subsequently he was forcefully evicted by the respondent.

4. During the eviction, the Applicant contends that, his household goods worth Kshs. 500,000/= were either destroyed or confiscated causing him to file a suit being CMCC 359 of 2012 seeking *inter alia* for the Kshs. 500,000/= being the value of goods damaged by the respondent. Judgment was delivered in that matter on the 18th January, 2017 in his absence in favour of the Respondent by Hon. B. Mararo Principal Magistrate.

5. That for several months afterwards the file went missing from the court's registry and by the time it was located time had lapsed for him to give instructions for filing of an appeal and his application seeking to file the appeal out of time was dismissed.

6. The respondent filed grounds of opposition dated 15th July 2020 which came out as follows;

a) That the application is utterly defective and abuse of Court process as the same is not soundly grounded on any relevant or known provisions of law

b) That the issues raised herein have already been decide in Nakuru **CMCC No. 359 of 2012; David R Andanje V Nakuru water & Sanitation service limited** and the suit dismissed on 18th January, 2017 hence the so called fresh suit is likely to be res-judicata.

7. About three months later the Respondent, filed a follow up Replying affidavit sworn on 13th October 2020 by J.N Gachathi, the managing director at Nakuru Water & Sanitation Services Limited. It is the respondent's position that the application is utterly defective and an abuse of court process as the same is not soundly grounded on any relevant or known provisions of law; that the issues raised herein have already been decided in NAKURU CMCC NO.359 OF 2012, **DAVID R. ANDAJE VS NAKURU WATER & SANITATION SERVICES LTD** and the suit dismissed on 18th January 2017 and the fresh suit sought to be filed, are likely to be *res judicata* running afoul of **section 7 of the Civil Procedure Act**. The respondents seek the dismissal of the application.

8. This application was disposed of by way of written submissions with the Applicant filing his submissions on the 28th September, 2020 while the Respondent filed its submissions on the 25th September, 2020.

Applicants submissions.

9. The Applicant submitted that the court in dismissing his suit in Nakuru **CMCC 359 of 2012** was based on the reason that, the trial court found that he filed his claim four (4) years after the cause of action. However, the court's judgment did not indicate what should happen to his property that was confiscated by the respondent. In addition, that the trial court did not address the issue of the illegal deduction of the house rent from his salary.

10. It was further submitted that, the applicant was invoking the inherent jurisdiction of this court as provided for in **section 3 and 3A of the Civil Procedure Act**. To put emphasis on this he cited an extract from **Halbury's Laws of England .4th edition. Vol. 37 paragraph 14** which stated as follows;

“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone ,whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process...In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers ,a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

11. It was then submitted that, the claimant had suffered and continues to suffer injustice occasioned by the respondent for years which injustice can only be corrected by this court. That he had tried to access the property that was confiscated by the respondent in vain. To add insult to injury, the respondent had never stopped deducting house rent even though he was no longer in occupation of the house.

Respondent's Submission.

12. The Respondent on the other hand submitted that the application is *res judicata* as the issues raised have already been determined by a court of competent jurisdiction in Nakuru CMCC No. 359 of 2012. It was argued that this application goes against the express provision of section 7 of the Civil Procedure Act and in this they cited the case of **Independent Electoral and Boundaries Commission v Maina Kiai & 5 other [2017] eKLR** where the Court held that;

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

13. Accordingly, it was submitted that the issues that are likely to be raised in the intended claim, are issues that were dealt with in the main suit at the chief magistrates' court which is likely to offend the doctrine of *Re Judicata*.

14. I have examined the averments of the parties herein. The applicant seeks leave to file his suit against orders emanating from a Judgment of the court in CMCC No. 359 of 2012. The applicant does not indicate that he is filing an appeal emanating from the Judgment of the lower court. The applicant contends that in the lower court issues of his goods that had been confiscated by the respondent were not addressed.

15. As that may be, it seems that the cause of action in the matters sought to be litigated against arose before 2012.

16. This means that the claim would in that respect be time barred. Other than that the claim was heard and determined and therefore the application being sought cannot be granted because it is not based on any known law since it is also not an appeal.

17. I find the application lacks merit.

18. I dismiss it accordingly with costs.

19. Each party to bear its costs.

RULING DELIVERED VIRTUALLY THIS 11TH DAY OF NOVEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Chelagat for Respondent – present

Washiali for claimant – present

Court assistant - Fred