Iravuhah v Standard Chartered Bank & another (Civil Case E019 of 2021) [2024] KEHC 7526 (KLR) (24 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7526 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL CASE E019 OF 2021

RN NYAKUNDI, J

JUNE 24, 2024

BETWEEN

JACKSON IRAVUHAH ..... APPLICANT

AND

STANDARD CHARTERED BANK ..... 1ST RESPONDENT

PHILIPS INTERNATIONAL AUCTIONEERS ..... 2ND RESPONDENT

RULING

1. Before me for determination is an application dated 20th July, 2023 expressed to be brought under the provisions of Section 1B (1) (a), 3A, and 63(e) and 80 of the *Civil Procedure Act*, order 40 Rules 1, 4; Order 45 Rule 1, Order 51 Rules 1 and 10 of the Civil Procedure Rules. The applicant seeks reliefs as follows: -

    a. Spent

    b. That pending the hearing and determination of the instant application, this Honourable court be pleased to issue an order of Injunction restraining the defendants by themselves, their agents, servants or anyone else acting under their instructions from selling transferring or dealing in any manner with the property known as Eldoret Municipality/Block 14/115, The Aviation Center, Teleview Area, Eldoret, Uasin Gishu;

    c. That pending the hearing and determination of the instant application, this Honourable Court be pleased to issue an order of injunction suspending the sale by auction of the property known as Eldoret Municipality/Block 14/115, The Aviation Center, Teleview Area, Eldoret, Uasin Gishu that is set to take place on 21st July, 2023.

    d. That pending the hearing and determination of the main suit, this Honorable Court be pleased to issue an Order of Injunction restraining the defendants by themselves, their agents,

servants or anyone else acting under their instructions from selling, transferring or dealing in any manner with the property known as Eldoret Municipality/Block 14/115, The Aviation Center, Televiev Area, Eldoret, Uasin Gishu;

e. That pending the hearing and determination of the main suit, this Honourable Court be pleased to issue an Order of Injunction suspending the sale by Auction of the property known as Eldoret Municipality/Block 14/115, The Aviation Centre, Televiev Area, Eldoret, Uasin Gishu that is set to take place on 21st July, 2023;

f. That this Honourable Court be pleased to issue an Order of review of its ruling delivered on 18th May, 2022;

g. That pending the hearing and determination of the main suit, this honorable court be pleased to issue an Order of Injunction restraining the 1st Defendant/Applicant from levying penalties over a loan which is the subject of these proceedings;

h. That this Honorable Court be pleased to grant an Order for leave to amend the Plaint;

i. That this Honorable Court be pleased to issue any further orders as it deems fit and just to grant.

j. That the costs of the application be in the cause.

2. The application is supported by an affidavit sworn by Jackson Iravuhah and grounds reproduced as follows: -

a. That the Plaintiff/Applicant is the owner and proprietor of Eldoret Municipality/Block 14/115, The Aviation Center, Televiev Area, Eldoret Uasin Gishu;

b. That the said property houses educational institutions that currently serve and sustain a population of over 500 persons directly and numerous more indirectly;

c. That the said property was charged following a loan taken by the Plaintiff/Applicant for use by the said educational institutions;

d. That the amounts disbursed to the Plaintiff/Applicant totaled to Kshs. 30,000,000/=

e. As a result of the prevailing economic and health challenges including the Covid-19 pandemic, the Plaintiff/Applicant has struggled to keep up with payments and has in some cases defaulted;

f. The Plaintiff/Applicant urges that thus far, he has maid payments of over Kshs. 34,000,000/=

g. The Plaintiff has raised concerns regarding the computation of monies owed including the fact that if the amounts claimed by the 1st Defendant/Respondent are to be relied on, then he still owes the bank a further Kshs. 33,413,384.84/= a figure the Plaintiff/Applicant contests.

h. That the Plaintiff/Applicant commissioned an auditor to look into the figures and raised important questions that require further interrogation.

i. Despite these questions, the Plaintiff/Applicant continues to make payments towards a loan that has now become a bottomless pit.

j. That by way of a news paper advertisement in the daily Nation of 10th July, 2023, the 2nd Defendant/Respondent caused to be published a list of properties for sale by public auction.

k. That among the properties to be auctioned was known as Eldoret Municipality/Block 14/115, The Aviation Center, Teleview Area, Eldoret Uasin Gishu, a property belonging to the Applicant herein.

l. That the Respondents are determined to carry out the auction despite the fact that the Plaintiff/Applicant has made payments of Kshs. 1,200,000/= over the last one year even as he disputes the computation of the loan balances.

m. That a sale of a property that represents the Plaintiff/Applicant's life's work will cause him irreparable loss and agony.

n. That by a ruling dated 18th May, 2022, this honorable court denied the Plaintiff's prayers stopping the sale of his property on the basis that no payments had been made towards settling the loan.

3. In response to the application, Justus Musembi swore a replying affidavit in his capacity and the Associate Principal, Stressed Assets Group of the 1st Defendant. According to the 1st Respondent, the Plaintiff did approach them for a banking facility on 17th November, 2011 of Kshs 32,000,000/= and the same was granted through three types of facilities as follows:

a. Overdraft facility of Kshs. 2,000,000/=

b. New term loan for Kshs. 10,000,000/=

c. Mortgage loan – commercial facility for Kshs. 20,000,000/=

4. The Respondent further deponed that the Plaintiff did sign a Guarantee on the 19th November, 2011 with the 1st Defendant/Respondent. It was the 1st respondent's position that there were terms and conditions which expressly stated that for each loan facility advances to the Plaintiff which included interest. That interest was not charged from 18th February, 2020 to 18th January, 2022 owing to the directive issued by the Central Bank of Kenya.

5. The 1st Respondent added that the Plaintiff/Applicant has terribly failed in his primary duty to service the loan by payment of monthly installments and the loan accounts which as at 30th June, 2023 is in arrears of a colossal sum of Kshs 21,538,842.99/=.

6. It is contended by the 1st Respondent that the interest charged by the 1st Defendant/Respondent is clear and legal and it was an agreement between the Plaintiff and that the 1st Respondent under the charge instrument that the rates for calculating interest shall be determined by the charge from time to time within the limits permitted by law subject to any agreement between the parties as set out in Section 44A of the *Banking Act*.

7. The 1st Respondent took the position that the in duplum rule provides that arrear interest ceases to accumulate upon any amount of the loan owing once the accrued interest equals the principal amount owing when the loan becomes non-performing at no time should the lender allow the unpaid interest to reach the unpaid capital amount.

8. That the current unpaid interest of Kshs. 12,374,514.85/= has not reached the unpaid capital of Kshs. 21,538,842.99/=. Hence the in duplum rule cannot be applied.

9. The 1st Respondent deponed that Plaintiff had filed an application for injunction dated 8th July, 2021 where one of the prayers was for supply of the statement of account on the financial facilities of the loan granted and the repayments made from the time the charge registered on the Plaintiff's property.

10. That the statement of accounts was presented on 18th August, 2021 which enumerated the principal payment, interest payment, interest rate history and all the accruals.

11. The 1st Respondent posited that the Plaintiff/Applicant has not met the rules of review as set under Order 45 for the ruling delivered on 18th May, 2022 and the Plaintiff made no efforts to follow up with the case for more than 1 year and the present application has come as an afterthought aimed at frustrating the 1st defendant from exercising its statutory power of sale.

12. Further that there is no error which is apparent on record nor is there discovery of new and important evidence which was not within the knowledge of the Plaintiff. That in view of the foregoing the loan subject matter herein is still outstanding and the property has not been redeemed.

13. In the 1st Respondent's view, the Plaintiff's application, admitted debtor, is an attempt to avoid paying their just debt and in the process cripple and/or even drive the bank out of business and this Honourable Court of equity should look at the Plaintiff's knowledge and motives and dismiss the application. That the allegations contained in the Plaintiff's supporting affidavit have been made without any factual foundation or basis and is suspect for ulterior motives in an attempt to improperly use limited judicial resources in a mission of rendering the 1st Defendant/Respondent a scapegoat.

14. Finally, it is deponed on behalf of the 1st Respondent that the Applicant will not be prejudiced by the sale of the property or further that in the alternative if they are so prejudiced by the exercise of the power of sale, they will have a remedy in damages. Therefore, the application is unmerited and that the balance of convenience tilts in favor of the 1st defendant.

15. Having given that layout, I pause to bring to the parties' attention that a similar application was before me for determination. The application dated 8th July, 2021 sought primarily a temporary injunction restraining the defendants from the selling, transferring or dealing in any manner with the Plaintiff' parcel of land known as Eldoret Muncipality/Block 14/115 and all developments on the land pending the hearing and determination of the application and the suit. Upon the considering the matter, this court made a determination in the following terms: -

> " The only remedy or cure in the treatment of a debt is, repayment. It will not be in the interest of justice for a lending institution which has discharged its obligation in a contract to keep begging for its money which is a key tool in trade. Courts should not be summoned to cover the guilt where such coverage will be at the detriment of the other party. On a balance of convenience justice tilts in the defendants/Respondent's favor. The set of facts and the reality facing the court in this application is rather peculiar. The mortgagee has a right to sue for the debt which encompasses the proprietary rights in the security offered by the mortgagor."

Analysis and determination

16. Before I delve into the substantive issues raised to the application, I will examine whether the present application is res judicata. At a preliminary stage, this court on 21st July, 2023 gave a hint of the directions this matter ought to have taken. This court made orders as follows:

> " That a decision on injunction has already been made which is also the same issue sought by the application.
>
> That in my view, Section 7 of the CPA is likely to oust my jurisdiction to entertain another application of the same nature.

That what is available to the parties was an appeal."

17. The doctrine of Res judicate is set out in Section 7 of the *Civil Procedure Act* 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 can 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."

18. Essentially, the implication of the doctrine of res judicata is that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction. The court in the English case of Henderson v Henderson (1843-60) All ER 378, observed thus:

> " ...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

19. The Court of Appeal in John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR (which decision was overturned by the Supreme Court) also, and so correctly, discussed the doctrine of res judicata at length. The Court stated in part as follows: -

> The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be

subjected to the doctrine of res judicata. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.

We also resist the invitation by the appellants to hold that all constitutional petitions must be heard and disposed of on merit and that parties should not be barred from the citadel of justice on the basis of technicalities and rules of procedure which have no place in the new constitutional dispensation. The doctrine is not a technicality. It goes to the root of the jurisdiction of the court to entertain a dispute. If it is successfully ventilated, the doctrine will deny the court entertaining the dispute jurisdiction to take any further steps in the matter with the consequence that the suit will be struck out for being res judicata. That will close the chapter on the dispute. If the doctrine has such end result, how can it be said that it is a mere technicality" If a constitutional petition is bad in law from the onset, nothing stops the court from dealing with it peremptorily and having it immediately disposed of. There is no legal requirement that such litigation must be heard and determined on merit.

From our expose of the doctrine above, we are now able to formally answer the issues isolated for determination in this appeal earlier as follows: -

i) The doctrine of res judicata is applicable to constitutional litigation just as in other civil litigation as it is a doctrine of general application with a rider, however, that it should be invoked in constitutional litigation in rarest and in the clearest of cases.

ii) There is no legal requirement or factual basis for the submission that the doctrine must only be invoked and or ventilated through a formal application. It can be raised through pleadings as well as by way of preliminary objection.

iii) The ingredients of res judicata must be given a wider interpretation; the issue in dispute in the two cases must be the same or substantially the same as in the previous case, parties to the two suits should be the same or parties under whom they or any of them is claiming or litigating under the same title and lastly, the earlier claim must have been determined by a competent court.

20. Applying the foregoing to the present case, I note that the gist of the application dated 20th July, 2023 revolves around the question of equitable remedies particularly that of an injunction, which was substantially dealt with in the application dated 8th July, 2021. Can it then be said that the issues in the application have already been heard and determined by a court of competent jurisdiction? My answer to that is in the affirmative. Perhaps the only issue this court could consider is the orders sought of review and the relief for an amendment.

21. Regarding the relief on review, under section 80 of the *Civil Procedure Act* and order 45 rule 1 of the Civil Procedure Rules, the court may review its decision, inter alia: - on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

22. An error or mistake apparent on the face of the record is one that is self-evident and does not require elaborate arguments to be established. See Paul Mwaniki v NHIF Board of Management [2020] eKLR.

23. I have gone through the record over and again to trace any substantial ground warranting a review of the Ruling delivered on 18th May, 2022. According to Plaintiff/Applicant at paragraph *21*, the change of circumstances and the payments made by him despite the challenge of the unclear computation of the loan is sufficient to request this honourable court to review its ruling.

24. Is there any such mistake or error on the face of the record? I think not. For avoidance of doubt, the legal framework on review is clear as set out under Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the *Civil Procedure Act* which Provides as follows:

80. Any person who considers himself aggrieved-

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -

45 Rule 1 (1) Any person considering himself aggrieved-

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay."

25. From the foregoing provisions of the law on review, it is evident that Section 80 empowers the court to review whereas Order 45 outlines the rules which restrict the ground for review. In that regard, review is limited to the following grounds:

a. discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

b. on account of some mistake or error apparent on the face of the record, or

c. for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

26. Therefore, review is only granted when the court considers that it is necessary to correct an error or omission on the part of the court. That error or omission should be self-evident, which does not need a substantive explanation or argument to establish it. In Nyamogo & Nyamogo v Kogo {2001} EA 170 discussing what constitutes an error on the face of the record, the court held as follows: -

> " An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again,

if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal."

27. Following the cited authorities, vis avis the ground advanced by the applicant for review, I find that the reasons by the applicant fall short of the requirements for review particularly Order 45 Rule 1 of the Civil Procedure Rules. It is therefore not a proper case for the court to grant orders as to review. The Applicant has lost on this count.

28. The next relief sought is that of leave to amend the Plaint. What is the law on amendment?

29. Order 8 Rule 3 of the Civil Procedure Rules provides for amendment of pleadings with leave of court as follows: -

    a. Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

30. Further, Order 8, rule 5 gives the court the general power to amend.

    31. 5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and, on such terms, as to costs or otherwise as are just.

32. In Institute For Social Accountability & another v Parliament of Kenya & 3 others [2014] eKLR the court held: -

> " The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings....The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side."

33. The Court of Appeal outlined the principles in amendment of pleadings in Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR as follows: -

> " The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others *vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991* as follows: -

> "The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts."

34. The legal framework governing the amendment of pleadings from the above cited decisions can be summarised as follows; that the amendment should not introduce new or inconsistent cause of actions or issues; the amendment should be made timeously; it should not affect any vested interest or accrued legal right and it should not prejudice or cause injustice to the other party. Reading through the application and the grounds thereof reveals to me that substantially, the applicant sought an order for injunction which suffocated all the other orders sought and as such much attention was not paid to the other orders of review and amendment. I say so because I am unable to discern from the application why the applicant seeks an amendment. He ought to have stated clearly the nature of the amendment for the court to determine whether such an amendment will change the nature of the case entirely. Nonetheless, I will grant leave for the amendment and equally allow that Respondents to amend their defence if need be.

35. In the end, the application partially succeeds as the applicant is granted leave to amend his Plaint. Each party shall bear its on costs

36. It is hereby so ordered.

DATED AND SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 24TH DAY OF JUNE, 2024

.....

R. NYAKUNDI

JUDGE