



REPUBLIC OF KENYA



Bundi & another v Hubaal Travel Agency & 2 others (Civil Suit E022 of 2023) [2024] KEHC 9688 (KLR) (29 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9688 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL SUIT E022 OF 2023
SN MUTUKU, J
JULY 29, 2024**

BETWEEN

SHIRLEY MORAA BUNDI 1ST APPLICANT

CYNTHIA BUARI BUNDI 2ND APPLICANT

AND

HUBAAL TRAVEL AGENCY 1ST DEFENDANT

GULF AFRICAN BANK LIMITED 2ND DEFENDANT

LYDIA BOSIBORI ANYEGA 3RD DEFENDANT

RULING

The applications

1. Under consideration are two applications. The first application was filed by the 2nd Defendant and is dated 27th October 2023. It was filed by the 2nd Respondent seeking the following orders:
 - a. The Plaintiffs' suit be struck out for lack of locus standi for being sub judice and for being an abuse of the court process.
 - b. That costs of this application and of the suit be borne by the Plaintiffs.
2. To support this application, the 2nd Respondent has stated that the Plaintiffs lack locus standi to challenge the 2nd Defendant's exercise of its statutory power of sale; that the 3rd Defendant has challenged the 2nd Defendant's exercise of the statutory power of sale previously through (i) Kajiado HCC No. 17 of 2020 where an application for an injunction was dismissed in the ruling delivered on 11th December 2020, (ii) Nairobi CMCC No. E1334 of 2021 where the suit was stayed for being sub judice in a ruling delivered on 24th February 2021, (iii) Nairobi HC Insolvency Petition No. E056 of



2021 where an Application for a Scheme of Arrangement was dismissed in a ruling delivered on 5th September 2023.

3. It was further stated that both Nairobi CMCC No. E134 of 2021 and HC Insolvency Petition No. E056 are still pending before the respective courts and that the issues being raised in the present suit can be raised by the Plaintiffs in any of the two pending suits.
4. The 2nd Defendant claims that this is another attempt by the 3rd Defendant's privies to obtain the same reliefs that she has so far failed to obtain in three other suits she has brought in her name.
5. The second Application is the Notice of Motion dated 31st October 2023 filed by the Plaintiffs/Applicants. It seeks the following orders:
 - a. Spent.
 - b. That an order of injunction do issue directed at the 2nd Defendant/Respondent whether by themselves or through their servants, agents or employees restraining them from proceeding with the intended sale on 7th November 2023 and any other subsequent dates seeking to sell "All that parcel of land known as L.R No. Ngong.Ngong/91959, Nkoroi, Kajiado County" pending hearing of the Application herein.
 - c. That an order of injunction do issue directed at the 2nd Defendant/Respondent whether by themselves or through their servants, agents or employees restraining them from proceeding with the intended sale on 7th November 2023 and any other subsequent dates seeking to sell "All that parcel of land known as L.R No. Ngong.Ngong/91959, Nkoroi, Kajiado County" pending hearing of the suit.
 - d. Costs of the Application.
 - e. Such other order as the Court may deem necessary to grant.
6. The Applicants have advanced grounds in support of this application that Ngong/Ngong/91959 (suit property) belonged to their deceased father Fred Bundi Kiriago and was transferred to the 3rd Respondent following succession cause proceedings: that the 3rd Respondent charged the suit property with the 2nd Respondent to secure a loan facility in favour of the 1st Respondent; that the 1st Respondent defaulted in repayments prompting the 2nd Respondent to exercise their statutory power of sale of the suit property.
7. The Applicants have stated that the 3rd Respondent lacks capacity to charge the suit property having been diagnosed with severe depression and psychosis and having been treated for this disease multiple times.
8. They have stated that the 2nd Respondent has instructed auctioneers who have issued a Notification of Sale seeking to sell the suit property; that the 2nd Defendant has not demonstrated any efforts to recover the monies owed from the 1st Respondent; that the suit property is family home and the only home the Applicants know and that unless this Court intervenes and stops the intended sale pending the hearing and determination of this application, the Applicants will suffer irreparable damage
9. There are no replying affidavits to either of the two applications.
10. Following the directions issued by this Court, the two applications were argued together through written submissions. The Plaintiffs and the 2nd Defendant, who are the applicants in the two applications respectfully, have filed submissions.



2nd Defendant's Submissions

11. The 2nd Defendant has raised the following issues for determination:
 - a. Whether the Plaintiffs have locus standi to bring this suit.
 - b. Whether the suit is an abuse of court process.
 - c. Whether injunction should be granted in any event.
12. It was submitted in respect to the first issue that the charge was created between the 2nd Defendant and the 3rd Defendant and that the Plaintiffs are not parties to it nor was the charge for their benefit. It was submitted that a charge is a contract and only parties to that contract can sue upon it. The 2nd Defendant relied on [Wesley Momanyi Nyandoro v Alice Atambo & another](#) [2019] eKLR on the issue of privity doctrine to the effect that 'a contract cannot confer rights or impose obligations on any person other than the parties to the contract'.
13. The 2nd Defendant submitted that third parties can only sue on a contract if it is demonstrated that the contract was for their benefit (see [Aineah Liluyani Njirah v Agha Khan Health Services](#) [2013] eKLR; that it is only the chargor who can sue to restrain the charge from realizing the security (see [Eldoret Concrete Poles Limited v Bank of India & another](#) [2021] eKLR and that under section 103 of the [Land Act](#), children of the chargor are not one of the persons who can bring a suit against the charge.
14. On the second issue it was submitted that suit is an abuse of the court process for the reasons that the 3rd Defendant has previously filed three suits in respect of the suit property as shown above in this ruling and that all the suits named have been unsuccessful; that the Plaintiffs decided to file this suit accusing the 3rd Defendant of mental incapacity and therefore by filing this suit, the Plaintiffs are abusing the court process.
15. On the third issue it was submitted that the Plaintiffs must demonstrate prima facie case with a probability of success, which the Plaintiffs have not done going due to lack of locus standi of the Plaintiffs and the suit being an abuse of the court process.
16. It was submitted that there is nothing on record to support the allegations that the 3rd Defendant was suffering a mental incapacity when she signed the charge. Relying on [Grace Wanjiru Munyinyi & another v. Gedion Waweru Githunguri & 5 others](#) [2011] eKLR, the 2nd Defendant submitted that the Plaintiffs' case is a very serious thing to say that a person is of unsound mind or suffers mental disorder and that as it was stated in the Grace Wanjiru Munyinyi case above:

“.....a defendant who seeks to avoid a contract on the ground of his insanity, must plead and prove, not merely his incapacity, but also the plaintiff's knowledge of that fact, and unless he proves these two things he cannot succeed.”
17. It was submitted that it was hopeless for the Plaintiffs to argue that the 2nd Defendant ought to have pursued first the 1st Defendant who received the funds before coming after the 3rd Defendant who is the guarantor. The 2nd Defendant cited [Mwaniki Wa Ndegwa v. National Bank of Kenya Ltd & another](#) [2016] eKLR where it was held that:

“On the default of the principal debtor causing loss to the creditor, the guarantor is, apart from special stipulation, immediately liable to the full extent of the default or previous recourse against the principal.”



18. It was submitted that the Plaintiffs' suit is unsustainable; that they do not deserve an order of injunction and that the suit ought to be struck out. The 2nd Defendant urged this court to find merit in the Notice of Motion dated 27th October 2023 and allow the same.

Plaintiffs' Submissions

19. The Plaintiffs relied on *Giella v. Cassman Brown* {1973} EA 358, *Nguruman Limited v. Jan Bonde Nielson & 2 others* [2014] eKLR and *Mrao Ltd. V. First American Bank of Kenya Ltd* (2003) eKLR on the applicable principles before an injunction can be granted. They submitted that they have demonstrated a prima facie case. They reiterated their grounds in support of the Application that the 3rd Defendant guaranteed a loan for the 1st Defendant and consequently charged the suit property which is family property; that the 3rd Defendant had been diagnosed with depression and dementia and had no mental capacity to charge the suit property; that the 2nd Defendant has not demonstrated that it has made any attempts to recover the amounts due from the 1st Defendant who is the principal debtor. They relied on *Michael Mubuyi Kiven v. IG Sacco Limited* [2022] eKLR.
20. They submitted that the suit property is family home that the 3rd Defendant acquired through transmission after the death of her husband; that this is the only home the Plaintiffs know and that if the orders they are seeking are not granted they stand to suffer irreparable loss that cannot be compensated by an award of damages. They relied on *Pius Kipchirchir Kogo v. Frank Kimeli Tenai* (2018) eKLR where it was stated that:

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

21. They submitted that the balance of convenience tilts in their favour because they stand to suffer more harm if orders sought are not granted.
22. In opposition to the Notice of Motion dated 27th October 2023, it was submitted that a party seeking to invoke the doctrine of res sub-judice must therefore establish that there are more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and that the suits are between the same parties or their representatives (see *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR).
23. They submitted that this suit involves the 3rd Defendant's capacity to charge the suit property and the 2nd Defendant's inability to prove any efforts to recover the debt owed from the 1st Defendant; that the instant suit is between the children and their mother and not children as representative of their mother and therefore the suit is not sub judice as neither does it involve the same parties nor is it about the same subject matter as the other suits.
24. They submitted that the court's jurisdiction to dismiss a suit is draconian and ought to be exercised sparingly. They relied on *Yaya Towers Limited v. Trade Bank Limited (In Liquidation)* Civil Appeal No. 35 of 2000 where it was stated that:

“A Plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can



demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial..... It cannot be doubted that the Court has inherent jurisdiction to dismiss that which is an abuse of the process of the court. It is a jurisdiction which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable and one, which was difficult to believe, could be proved.”

25. They submitted that the 2nd Defendant's Notice of Motion dated 27th October 2023 is not merited and ought to be dismissed with costs.

Analysis and determination

26. I have considered the two applications, submissions of parties and authorities cited. I want to address my mind to the following issues:

- a. Whether this suit is res judicata tied to whether the Plaintiffs have locus standi.
- b. Whether the suit is an abuse of court process.
- c. Whether injunction should be granted.

27. I have considered that this is not the first suit in respect to Ngong/Ngong/91959 being HCCC No. 17 of 2020 *Lydia Bosibori Anyega v. Gulf African Bank & another*. By a Plaint dated 17th August 2020, the 3rd Defendant filed a suit challenging the defendants who included the 2nd Defendant from advertising the suit property herein for sale by public auction. The 3rd Defendant also filed a Notice of Motion of the same date seeking an injunction to restrain the defendants from offering for sale or selling that property pending hearing and determination of the main suit. That application was dismissed.

28. The 3rd Defendant also filed Nairobi CMCC No. E134 of 2021 against the 2nd Defendant and two others seeking injunction against the defendants to restrain them from sale by public auction of the suit property and to alternatively to order for an alternative security. That court granted stay of proceedings before it, pending hearing and determination of Kajiado High Court Commercial Case No. 17 of 2020 for the reason that the matter before the lower court was sub judice.

29. I have also noted that the 3rd Defendant filed Nairobi High Court Insolvency Petition No. E056 of 2021. She filed a Notice of Motion asking the Court to allow her to make a Scheme of Arrangement to pay creditors under section 304 (1) of the *Insolvency Act*. The court found no merit in the Notice of Motion and dismissed it. I have noted that the 2nd Defendant's assertion that the Nairobi CMCC and the High Court Insolvency Petition are still alive matters has not been controverted. I am aware that the Kajiado matter was withdrawn on 9th February 2021.

30. The Plaintiffs have argued that the current suit is not res judicata because the parties are not the same and the subject matter is not the same. Section 7 of the *Civil Procedure Act* provides that:

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.

31. I have given the issues raised by the Plaintiff's serious consideration. At the bottom of all the suit mentioned here involving this one, the issue has always been the suit property. It is because the suit



property was offered as security for loan facility advanced to the 1st Defendant and a charge created over the suit property, that the 1st Defendant has defaulted and therefore the 2nd Defendant is pursuing to exercise its statutory power of sale that all these suits have been filed. By alleging lack of mental capacity by the 3rd Defendant to charge the suit property, the Plaintiffs are seeking orders whose ultimate effect would be to stop the 2nd Defendant from exercising the statutory power of sale.

32. By claiming that the suit property is family property and therefore by selling it would render the Plaintiffs destitute because that is the only home they know, the Plaintiffs are seeking injunctive orders to stop the 2nd Defendant from exercising its statutory power of sale. The 3rd Defendant has been in court in Kajiado, in Nairobi Chief Magistrates Court and the Commercial and Taxation Division of the High Court in Nairobi in an attempt to stop the 2nd Defendant from exercising its statutory power of sale.
33. I am persuaded to find, which I hereby do, that the issues being raised by the Plaintiffs in this matter cannot be far removed or separated from the central issue in this matter, exercise of the 2nd Defendant's statutory power of sale in respect of Ngong/Ngong/91959. To my mind, that is the matter directly and substantially in issue in this suit and which has been directly and substantially in issue in former suits mentioned above. It is true that the Plaintiffs are not parties in the other suits mentioned. But it is also not lost to me that Plaintiffs are not parties to the contract (charge) between the 2nd Defendant and the 3rd Defendant. I am guided by *Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi* [1985] eKLR where the Court of Appeal (Hancox JA) stated that:

“As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

34. The doctrine of privity of contract does not confer rights or impose obligation on any person other than the parties to that contract.
35. I have considered the issue of locus standi and I agree with the 2nd Defendant that the Plaintiff's are not parties to the contract between it and the 3rd Defendant and I agree with the position taken by the 2nd Defendant. They are not parties to the contract between the 2nd and 3rd Defendants and therefore they have no legs to stand on in respect of this case much as they have disguised the suit to make it appear like a totally different matter. If this court were to entertain their claim in this case, it would adversely affect the pending suits in respect of the suit property thereby prejudicing the parties.
36. On the issue of granting an injunction, I have considered whether the Plaintiffs have demonstrated prima facie case, irreparable injury if injunction is not granted and the balance of convenience. Having reasoned as I have above, it is clear to my mind that the Plaintiffs have not demonstrated prima facie case. The effect of what the Plaintiffs are doing by filing this suit is to assist the 3rd Defendant to avoid the contract by claiming that she had no capacity to charge the property. What concerns me is why the Plaintiffs did not seek to be enjoined in the other suits previously filed by the 3rd Defendant. I have not seen pleadings in those cases and therefore I am not able to determine whether lack of capacity to charge the property is pleaded.
37. To my mind, the Plaintiffs have not persuaded me that they deserve an order of injunction. By charging the suit property, the 3rd Defendant converted it into a commercial property subject to be sold in case



the terms of the contract were not complied with. By exercising their statutory power of sale, the 2nd Defendant is legally acting as provided under the law and it cannot be claimed that a party affected by that sale will suffer irreparable loss if the charged property is sold.

38. After giving this matter considerable scrutiny, I am persuaded to find that the Plaintiffs are abusing court processes. They can seek to be enjoined in the existing suits as parties or interested parties and argue the issues they have brought under this instant case. The door to seek justice is not closed to them if they have an arguable case given that the other matters are not determined.
39. It is my finding and I so hold that the Plaintiffs' Notice of Motion dated 31st October 2023 lacks merit and is hereby dismissed with costs to the 2nd Defendant. I find and hold that the 2nd Defendant's Notice of Motion dated 27th October 2023 is hereby allowed with costs.
40. The effect of this order is that the Plaintiffs' Notice of Motion dated 9th October 2023 stands dismissed with costs. The Plaintiffs can choose to join the existing suits as parties and argue their case.
41. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 29TH JULY 2024

S. N. MUTUKU

JUDGE

