



REPUBLIC OF KENYA



**Kariuki v Mwirambua & 2 others (Civil Case E015 of 2024)  
[2024] KEHC 10438 (KLR) (23 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10438 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL CASE E015 OF 2024  
FN MUCHEMI, J  
AUGUST 23, 2024**

**BETWEEN**

**JAMES KIBE KARIUKI ..... PLAINTIFF**

**AND**

**JOSPHAT GICHUNGE MWIRAMBUA ..... 1<sup>ST</sup> RESPONDENT**

**MWANANCHI CREDIT LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**GARAM INVESTMENT AUCTIONEERS ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Brief facts**

1. The application for determination is dated 18<sup>th</sup> June 2024 seeking for the orders of an injunction restraining the defendants, their servants and/or agents from selling all that parcel of land known as LR. No. Ruiru East/Juja East Block 2/795 by public auction until the hearing and determination of the suit.
2. The 2<sup>nd</sup> respondent filed a preliminary objection dated 20<sup>th</sup> June 2024 against the hearing of suit and the application on grounds that the applicant had no *locus standi* to sue the 2<sup>nd</sup> defendant in that there was no contractual relationship between the two parties.

**The Applicant's Case.**

3. The applicant states that in 2019 he entered into an agreement of sale with the 1<sup>st</sup> respondent for the purchase of 3 plots namely Plot Nos. 1, 2 and 28 out of LR No. Ruiru East/Juja Block 2/795. The applicant states that he paid the full purchase price for the said plots at Kshs. 3,200,000/- and on 29<sup>th</sup> February 2020, he was issued with an ownership certificate by the 1<sup>st</sup> respondent's company. Pursuant to the sale agreement, the applicant states that he was given possession of the said plots where



he developed one of them by erecting a permanent residential house, a permanent wall in addition to other developments.

4. On 10<sup>th</sup> June 2014, the applicant avers that he was informed by a friend that he had seen an advertisement in the newspaper of the sale of the suit property by public auction to be held on 25<sup>th</sup> June 2024 by the 3<sup>rd</sup> respondent. Further, the applicant states that the same friend gave him a copy of a search of the suit property which showed that after selling the plots, the 1<sup>st</sup> respondent proceeded to borrow a loan from the 2<sup>nd</sup> respondent.
5. The applicant states that for the 1<sup>st</sup> respondent to borrow money using the suit land as collateral knowing very well that he sold the portions of land to several buyers amounts to fraud and is illegal.
6. The applicant argues that if the said sale by public auction is allowed to proceed, he stands to suffer irreparable loss and damage. The applicant avers that the respondents do not stand to suffer any irreparable loss if the sale is stopped .

### **The 2<sup>nd</sup> Respondent's Preliminary Objection**

7. The 2<sup>nd</sup> respondent states that the court has no jurisdiction to hear and determine the instant suit noting that the applicant seeks to stop and or restrain the 2<sup>nd</sup> respondent from exercising its powers of sale under the charge and that he purports to challenge the charge registered between the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
8. In view of the dismissal of the applicant's suit MC ELC Case No. E119 of 2023 *James Kibe Kariuki v Josphat Gichunge Mwirabua & Others* vide a ruling dated 5<sup>th</sup> March 2024 allowing the 2<sup>nd</sup> respondent's preliminary objection dated 15<sup>th</sup> December 2023 which dismissal was confirmed by this court in the ruling dated 2<sup>nd</sup> May 2024 in Miscellaneous Civil Case No. E001 of 2024 *James Kibe Kariuki v Josphat Gichunge Mwirabua & Others*, the instant suit is *res judicata*.
9. The 2<sup>nd</sup> respondent argues that the applicant has no locus to file the instant suit, challenge the charge or stop it from exercising its statutory power of sale. The Court of Appeal in *Bank of Africa Kenya Limited & Another v TSS Investment Limited & 2 Others* (Civil Appeal E055 of 2022) [2024] KECA 410 (KLR) (26 April 2024) (Judgment) was emphatic that the 1<sup>st</sup> & 2<sup>nd</sup> respondents had no contractual or other legal right of claim under the charge on the basis of which the 1<sup>st</sup> appellant moved to realise its security. Neither do the two have any right or interest recognized under Section 24 of the *Land Registration Act* 2012 as they do not fall in any of the categories of persons entitled to seek relief under Section 103(1) and (2) of the *Land Act* 2012.
10. The 2<sup>nd</sup> respondent argues that the suit contravenes the express provisions of Section 3(3) of the *Law of Contract Act* and Section 12 of the *Civil Procedure Rules*, 2010.
11. The 2<sup>nd</sup> respondent further argues that there is no reasonable or known cause of action against the applicant. In *Kenya National Capital Corporation Limited v Albert Mario Corddeiro & Another* NRB CA Civil Appeal No. 274 of 2003 [2014] eKLR the Court of Appeal declared that a party claiming ownership of charged land as a purchaser is a 3rd party having no direct contact with the bank and had no cause of action against the bank.
12. The 2<sup>nd</sup> respondent relies on HCCC No. E030 of 2020 and states that being the charge, it had to give consent to any sale which it did not.
13. Parties disposed of the application by way of written submissions.



## The Applicant's/Plaintiff's Submissions

14. The applicant relies on the case of *Re Estate of Nchogu Sagana (Deceased)* [2021] eKLR and submits that the matter is not *res judicata*. The suit in Thika CM Case No. 119 of 2023 was not substantially heard and determined as the plaintiff did admit that the court had no territorial jurisdiction to hear and determine the suit. The same was dismissed for lack of territorial jurisdiction. The suit in Thika High Court Miscellaneous Civil Case No. E001 of 2024 is not directly and substantially related with the instant suit as it only sought to have the matter in Thika CM Case No. 119 of 2023 transferred to a court that had jurisdiction which was later struck out meaning that the same was deemed as having been never filed.
15. The applicant further submits that he was not a party to the Ruiru Magistrate suit Application No. E030 of 2023 and did not participate in any proceedings in the said suit and that the ruling delivered on 31<sup>st</sup> October 2023 was and is never binding on him. The applicant submits that he came to learn of the said ruling after the land was advertised for public auction by Mistan Auctioneers.
16. The applicant argues that the issue of injunctive relief in the instant suit has never been heard and determined before any court clothed with jurisdiction.
17. Relying on the case of *Re Estate of Pauline Muthoni Nyaga (Deceased)* [2019] eKLR, the applicant argues that the issues raised in the preliminary objection are of the nature that would require calling of evidence.
18. The applicant submits that the court has jurisdiction to hear and determine the suit as he entered into an agreement with the 1<sup>st</sup> respondent for the sale of Plot Nos. 1, 2 and 28 on LR No. Ruiru East/Juja East/Block 2/795 (Phase 35) and the 1<sup>st</sup> respondent proceeded to obtain a loan from the 2<sup>nd</sup> respondent using the suit properties as collateral. The applicant argues that pursuant to Section 3(3) of the *Law of Contract Act* he and the 1<sup>st</sup> respondent entered into a valid sale agreement and the contract between them has not been challenged in any way and neither has the signature of the 2<sup>nd</sup> respondent on the said agreement.
19. The applicant argues that at the time he was purchasing the suit properties, there were no encumbrances registered on the suit properties. As such, he is the legal owner of the suit properties having legally purchased them through the sale agreement which is not contested. Thus, the 2<sup>nd</sup> respondent is interfering with the peaceful occupation and ownership of the applicant of the suit properties by instructing the 3<sup>rd</sup> respondent to auction his land. The applicant therefore argues that he has locus standi to institute the suit against the 2<sup>nd</sup> respondent since he is the legal owner of the suit properties.
20. The applicant submits that LR No. Ruiru East/Juja East/Block 2/795 has already been advertised in the newspaper for sale by public auction and unless an injunction is issued against the respondents he stands to suffer irreparable loss and damage.
21. Relying on the cases of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR; *Hezron Kamau Gichuru v Kianjoya Enterprises Ltd & Another* [2022] eKLR and *Paul Gitonga Wanjau v Gathuthis Tea Factory Company Limited & 2 Others* (2016) eKLR and submits that the balance of inconvenience lies in his favour.



## The 2<sup>nd</sup> Respondent's/Defendant's Submissions

22. The 2<sup>nd</sup> respondent submits that the instant suit is a well choreographed plan between the applicant and the 1<sup>st</sup> respondent to defeat its right to invoke the default clause and defraud the 2<sup>nd</sup> respondent over Kshs 13 million in unpaid loan arrears. The 2<sup>nd</sup> respondent submits that the applicant failed to disclose that he had filed Magistrates Court Case No. MCELC Case No. E119 of 2023 James Kibe Kariuki Mwirabua & Others. The applicant failed to disclose that it filed a preliminary objection dated 15th December 2023 based on the grounds among others that the applicant had no reasonable cause of action against it and that the entire suit and claim by the applicant offends Section 3(3) of the [Law of Contract Act](#). Further the applicant concealed from the court that the ruling dated 5<sup>th</sup> March 2024, the court dismissed the applicant's suit and allowed the 2<sup>nd</sup> respondent's preliminary objection which means that the instant suit is incurably defective granted there is a ruling confirming that the applicant has no cause of action against the 2<sup>nd</sup> respondent and that his claim is barred by Section 3(3) of the [Law of Contract Act](#), which ruling has not been appealed and or set aside.
23. Similarly the applicant filed Miscellaneous Civil Case No. E001 of 2024 [James Kibe Kariuki v Josphat Gichunge Mwirabua & Others](#) which was struck out by this court holding that the fact that MCELC Case No. E119 of 2023 was dismissed, the applicant had no claim or suit to be transferred.
24. The 2<sup>nd</sup> respondent states that it attached the ruling delivered by Honourable Agonda sitting at Ruiru Magistrates Court on 31<sup>st</sup> October 2023 in Application No. E30 of 2023 whereby the said proceedings involved the same parties and similar subject matter as the current suit being LR No. Ruiru East/Juja East Block 2/795. The proceedings involved similar parties under whom they claim as the instant suit. The 2<sup>nd</sup> respondent further submits that it commenced the proceedings in the Ruiru matter against the 1<sup>st</sup> respondent and the Land Registrar Ruiru.
25. In the instant suit, the plaint dated 18<sup>th</sup> June 2024, the applicant seeks to stop the 2<sup>nd</sup> respondent from selling the property LR No. Ruiru East/Juja East Block 2/795 for the loan taken out by the 1<sup>st</sup> respondent and an order declaring him the owner of the suit property. From the issues raised and determined by the court, in Application No. E030 of 2023, it is clear that the court determined that the property owned by the 1<sup>st</sup> respondent and took a loan against the same and since he had defaulted, the 2<sup>nd</sup> respondent had the right to foreclose and sell the subject property by auction. The 2<sup>nd</sup> respondent thus submits that the issues raised in the instant suit have already been determined by the court sitting in Ruiru and as such the suit is res judicata pursuant to Section 7 of the [Civil Procedure Act](#).
26. The 2<sup>nd</sup> respondent argues that the applicant claims from the 1<sup>st</sup> respondent who was a party to the proceedings in Application No. E030 of 2023 before the Ruiru Chief Magistrates Court. Further, the applicant herein is litigating under the same title as the proceedings in Application No. E030 of 2023 which is LR No. Ruiru East/Juja East Block 2/795.
27. Relying on the cases of [Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & Another](#) [2016] eKLR; [Alfred Sagero Omweri v Kennedy Omweri Sagero](#) [2021] eKLR and [E.T. v Attorney General & Another](#) (2012) eKLR, the 2<sup>nd</sup> respondent submits that the instant suit is res judicata and the applicant is conniving with the 1<sup>st</sup> respondent to defeat its right of foreclosure.
28. The 2<sup>nd</sup> respondent relies on Section 3(3) of the Law of Contracts Act and Section 38 of the Lands Act and submits that the applicant annexed a purported but undated agreement signed by Diamond Property Merchants Limited as the vendor but did not enjoin the said Diamond Property Merchants Limited as a party to the proceedings. Further, the purported agreement is over Plot Nos. 1, 2 and 28 yet the suit seeks orders over the property LR No. Ruiru East/Juja East Block 2/795.



29. The 2<sup>nd</sup> respondent submits that there is no agreement in writing and duly signed by the applicant and any of the respondents that has been annexed to the current proceedings. The certificate of search annexed by the applicant confirms that the title to property LR No. Ruiru East/Juja East Block 2/795 was issued in 2011. It is therefore clear that at the time the applicant alleges to have entered into an agreement on the subject property, it had a title and land reference number yet the agreement for the applicant is over Plot Nos. 1, 2 and 28.
30. Relying on the case of *Patrick Tarzan Matu & Another v Nassim Shariff Abdulla & 2 Others* [2009] eKLR, the applicant has no written agreement over the suit property and it is not signed by the applicant and the respondents herein. Thus, the applicant cannot superimpose an agreement between himself and Diamond Property Merchants Limited over Plot Nos. 1, 2 and 28 to defeat the 2<sup>nd</sup> respondent's rights of foreclosure.
31. The 2<sup>nd</sup> respondent submits that the agreement sought to be enforced by the applicant has an arbitration clause in Clause 20 but the applicant refused to disclose this fact to the court and further refused to invoke the said clause but rather chose to conceal material facts and mislead the court to issue interim orders despite knowing full well that the court had no jurisdiction.
32. Relying on the cases of *Rachael Nyamai v Jubilee Party of Kenya & Another* Election Appeal No. 58 of 2017 and *Geoffrey Mutbinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* (no citation given) and submits that this court has no jurisdiction to enforce and hear a suit founded on an alleged agreement with an arbitration clause.
33. The 2<sup>nd</sup> respondent argues that the applicant's claim is between him and the 1<sup>st</sup> respondent over Plot Nos. 1, 2 and 28. The 2<sup>nd</sup> respondent submits that it charged the property registered as LR No. Ruiru East/Juja East Block 2/795 on 23<sup>rd</sup> December 2019 which had a title deed issued in 2011 and is seeking to sale the same subject to the loan agreement that allows it to auction the property to recover the outstanding loan arrears. The 2<sup>nd</sup> respondent argues that there is no reasonable or known cause of action against it as it is not a party to any agreement with the applicant.
34. Relying on the case of *Kenya National Capital Corporation Limited v Albert Mario Cordeiro & Another* [2014] eKLR, the 2<sup>nd</sup> respondent submits that a party claiming ownership of charged land as a purchaser is a 3<sup>rd</sup> party having no direct contract with the bank and has no cause of action against the bank. Further, the 2<sup>nd</sup> respondent submits that as a chargee it did not give any consent to any sale.
35. The 2<sup>nd</sup> respondent submits that as of the time the applicant claims to have paid the purchase price over the suit properties that is on 29<sup>th</sup> February 2020, the suit property was already charged by the 2<sup>nd</sup> respondent for a loan of Kshs. 6,383,571/- on 23<sup>rd</sup> December 2019. Further, whereas the applicant seeks orders over LR No. Ruiru East/Juja East Block 2/795 his alleged agreement is over Plot Nos. 1, 2 and 28. Additionally, although the applicant claims that he paid the purchase price of Kshs. 3,200,000/- there is no evidence, documents and receipts to show that he paid the said sums. The purported agreement is not signed by the 2<sup>nd</sup> respondent but signed between the applicant and Diamond Property Merchants Limited who is not a party in the instant proceedings. Further, the applicant has not provided any evidence to prove that the said company is and or was registered owner of the subject property at the time he bought the suit properties.
36. The 2<sup>nd</sup> respondent further submits that the purported document of ownership produced by the applicant is an ownership certificate issued by Diamond Property Merchants Limited which also states that he is the owner of Plot Nos. 1, 2 and 28.



37. The 2<sup>nd</sup> respondent argues that the entire case is completely misguided and the applicant has miserably failed to prove that he has a prima facie case with a probability of success.

### Issues for determination

38. The main issues for determination are:-
- a. Whether the preliminary objection is sustainable.
  - b. Whether the applicant has met the requisite conditions to warrant the granting of a temporary injunction.

### The Law

#### Whether the preliminary objection is sustainable.

39. The case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection. The court observed thus:-

.....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

40. Sir Charles Newbold P. stated:-

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.

41. Similarly the Supreme Court in the case of *Hassan Ali Jobo & Another v Suleiman Said Shabal & 2 Others* SCK Petition No. 10 of 2013 [2014] eKLR held that:-

A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

42. Further in the case of *Hassan Nyanje Charo v Khatib Mwashetani & 3 Others*, [2014] eKLR the court held that:-

Thus a preliminary objection may only be raised on a 'pure question of law.' To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record.

43. Evidently, a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.

44. The 2<sup>nd</sup> respondent argues that the instant suit is res judicata as the trial court in Thika MCELC Case No. E119 of 2023 dismissed the applicant's suit thus upholding the 2<sup>nd</sup> respondent's preliminary



objection. The preliminary objection is thus hinged on *res judicata* which is anchored in Section 7 of the *Civil Procedure Act*. It provides:-

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 issue has been subsequently raised, and has been heard and finally decided by such court.

45. The Court of Appeal in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR held:-

For the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That the former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

46. From the foregoing, it is clear that for *res judicata* to suffice, a court should look at all the four corners set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the court in the former suit.

47. The applicant instituted a suit in Thika being MCELC Case No. E119 of 2023 *James Kibe Kariuki v Josphat Gichunge & Others* whereby the 2<sup>nd</sup> respondent herein filed a preliminary objection dated 15<sup>th</sup> December 2023 based on the grounds that the court lacked territorial jurisdiction, the plaintiff had no reasonable cause of action against the 2<sup>nd</sup> respondent and that the entire suit and claim by the plaintiff offended the provisions of Section 3(3) of the *Law of Contract Act*. On perusal of the plaint in the matter, the applicant prayed for judgment against the respondents in terms of an injunction restraining the respondents from selling LR No. Ruiru East/Juja East Block 2/795 by way of public auction and an order directing the 1<sup>st</sup> respondent to sub divide and transfer Plot No.s 1, 2 & 28 to the applicant.

48. The trial court rendered its ruling on 5<sup>th</sup> March 2024 finding that the court in Thika lacked the requisite territorial jurisdiction to entertain the application and the suit.

49. The 2<sup>nd</sup> respondent had initially filed a suit in Ruiru being Application No. E30 of 2023 against the 1<sup>st</sup> respondent herein and the Land Registrar Ruiru on suit property LR. No. Ruiru East/Juja East Block 2/795. The trial court rendered its ruling on 31<sup>st</sup> October 2023 and held that the 2<sup>nd</sup> respondent herein was permitted by law to exercise its statutory right of redemption but the same was being frustrated. The trial court further found that the 1<sup>st</sup> respondent herein was the registered owner of the suit property and he used it as collateral when he secured a loan facility from the 2<sup>nd</sup> respondent herein.



50. In the instant suit, the applicant is seeking to stop the 2<sup>nd</sup> respondent from selling the suit property LR No. Ruiru East/Juja East Block 2/795 for the loan taken out by the 1<sup>st</sup> respondent and an order declaring him the owner of the suit property, which is similar to the orders he sought in Thika MCELC Case No. E119 of 2023.
51. It is clear that the parties in all the three suits are similar save for the matter in Ruiru where the applicant was not a party to the suit. However. It is clear that the applicant in the instant suit is claiming under the 1<sup>st</sup> respondent who was a party to the former suits. Further, the subject matter is the same and the matter has been heard and determined by the court in Ruiru in Application No. E30 of 2023. Therefore, it is my considered view that the matter is res judicata.
52. It is also appreciated from the pleadings of the 2<sup>nd</sup> respondent that there exists a contractual relationship between it and the 2<sup>st</sup> respondent for a loan facility where the 1<sup>st</sup> respondent gave his land L.R. Ruiru East/Juja/east Block 2/795 as security. The applicant has not established any contractual relationship between him and the 2<sup>nd</sup> respondent and as such, he has no cause of action against him. The applicant cannot challenge or claim remedy from a contract where he is not a party.
53. In the event that this application and the suit against the 2<sup>nd</sup> respondent was to be struck out, prayer (a) of the plaint will have been disposed of. As prayer (b) seeking for an order of sub-division of the land L.R. Ruiru East/Juja East Block 1/795 to excise the plots claimed by the applicant and transfer them to the applicant, this court has no jurisdiction to grant such orders. The applicant had filed this suit in the ELC but it was transferred to this court on the strength of prayer No. (a) which this court would have jurisdiction to decide had it not been due to the issues of res judicata and the hitch on the Law of Contract. In my considered view, in the event that the matter is returned to the ELC to determine prayer (b) between the applicant and the other respondents save for 2<sup>nd</sup> respondent, the suit would still hit a snag due to the fact that the land in issue is a security for a loan.
54. In my considered view, this suit is misconceived, defective and the issues are res judicata.
55. Consequently, I find the preliminary objection successful and I hereby uphold it.
56. This suit is hereby struck out with costs to the 2<sup>nd</sup> respondent/defendant.
57. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 23<sup>RD</sup> DAY OF AUGUST 2024.**

**F. MUCHEMI**

**JUDGE**

