



**Muthusi v NCBA Bank Kenya PLC (Commercial Case E045 of 2024)
[2024] KEHC 16243 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16243 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL CASE E045 OF 2024
JK NG'ARNG'AR, J
DECEMBER 18, 2024**

BETWEEN

RITA NDUKU MUTHUSI PLAINTIFF

AND

NCBA BANK KENYA PLC DEFENDANT

RULING

1. The Plaintiff filed a Notice of Motion application dated 19th August 2024 under Certificate of Urgency pursuant to Order 51 Rule 1, 3 and 4 and Order 40 of the Civil Procedure Rules, 2010, Section 1A, 2A and 3B of the *Civil Procedure Act*, and all other enabling provisions of the law.
2. The Plaintiff/Applicant seeks for orders that pending the hearing and determination of the suit filed herewith, this court be pleased to issue orders restraining the Defendant/Respondent whether by itself, servants, agents and/or assigns from attaching, advertising for sale, auctioning, selling, trespassing into or in any other manner whatsoever interfering with the Plaintiff/Applicant's property known as MSA/MS/Block 1/337/A and/or her quiet possession of the said property. That pending the hearing and determination of the suit filed herewith, this court be pleased to issue orders compelling the Defendant/Respondent to furnish the Plaintiff/Applicant herein with a current statement of the loan account.
3. The application is premised on grounds that sometime in the month of May 2015, the Plaintiff/Applicant herein and her husband, David Waiganjo Koinange, entered into a loan agreement with the Defendant/Respondent for the purpose of purchasing a property MSA/MS/Block 1/337/A. That pursuant to entering into the said agreement, the Defendant/Respondent advanced to the Plaintiff/Applicant and her husband the sum of KShs. 28,440,000. That by way of an instrument of transfer dated 28th September 2015, the property was transferred in favour of the Plaintiff/Applicant and her husband and a title issued in their respective names. That the property was subsequently offered as collateral to the facility by way of a legal charge dated 29th September 2015. That despite the fact that



the property was registered in the name of the Plaintiff/Applicant and her husband, the latter took charge of servicing the loan.

4. The Plaintiff/Applicant avers that unfortunately her husband passed away on 10th September 2022 but sometime in the month of June 2024, the Purple Royal Auctioneers under instructions of the Defendant/Respondent herein issued the Plaintiff/Applicant with a 14-day notification of sale of the suit property for an alleged outstanding debt of Kshs. 28,575,794.88 with outstanding arrears of Kshs. 11,191,865.31. That the Plaintiff/Applicant disputes the said figures in their entirety but since the issuance of the said notice, all efforts to try and engage the Defendant/Respondent to reconcile accounts have proved to be an exercise in futility.
5. The Plaintiff/Applicant states that the Defendant/Respondent intends to sell the suit property by way of auction despite the fact that not all the appropriate statutory notices as provided for under Section 90 (1) and 96 of the Land Act, 2012 have been issued. That a forced sale valuation had not even been conducted to establish the price at which the property should be sold at in the event of an action for sale. That it is apparent that the Defendant/Respondent is keen on denying the Plaintiff/Applicant herein her right of equity of redemption. That the Defendant/Respondent shall not suffer any prejudice in the event the orders sought in the interim are allowed.
6. The Defendant/Respondent filed a Notice of Preliminary Objection dated 30th September 2024 on grounds that the instant suit offends the provision of Section 7 of the Civil Procedure Rules. That the entire suit herein is *res judicata* as the matter before this court has been heard and fully determined *vide* judgment delivered in Mombasa High Court Civil Case No. E086 of 2022, Ritah Nduku Muthusi v NIC Bank Limited which suit emanates from the same facts, touches on the same subject matter and seeks the same orders as the instant suit. That the entire suit is brought in bad faith, it is frivolous, vexatious and an abuse of the court process hence a good candidate for striking out with costs.
7. This court gave directions that the preliminary objection be dispensed with by written submissions. The Plaintiff/Applicant in their submissions dated 7th November 2024 argued that the plea of *res judicata* has been propagated on the basis of a preliminary objection and not by way of application. That it therefore becomes difficult for the court to interrogate the issue as a party is called upon to tender and produce court pleadings, documents and proceedings in respect of the previous suit which is said to have been filed for the court to compare them. That the court will thereafter be in a position to come up with the conclusion that the two suits concern the same parties and are in respect of the same subject matter.
8. The Plaintiff/Applicant placed reliance on the decisions in Ali Hassan Jobo & Another v Suleiman Said Shabbal & 2 Others, Petition No. 10 of 2013 (2014) eKLR, Hassan Nyanje Charo v Khatib Mwashetani & 3 Others, Civil Application No. 23 of 2014 (2014) eKLR, Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 Others, Application No. 50 of 2014 (2015) eKLR, Oraro v Mbaja (2005) 1 KLR 141, Ndegwa v Waruiru & 2 Others (Environment & Land Case E030 of 2023) (2024) KEELC 1364 (KLR) (13 March 2024) (Ruling), and Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Limited (2005) KLR 97.
9. The Plaintiff/Applicant submitted on costs that in making an order for payment of the same, costs should follow event as provided for under Section 7 of the Civil Procedure Act. That costs should therefore be awarded to the Plaintiff on full indemnity basis.
10. The Defendant/Respondent in their submissions dated 31st October 2024 argued that the Applicant has instituted numerous suits over the same parties and the same subject matter seeking identical prayers in MSA CMCC No. 50 of 2022 where the Plaintiff withdrew the suit and costs were awarded to the Defendant, MSA HCCC No. E086 of 2022 where the Plaintiff's suit was dismissed for



want of merit and costs awarded to the Defendant, MSA HCCA No. E065 of 2024 where the Appellant withdrew the appeal and costs were awarded to the Respondent, and the instant matter. That the aforementioned suits are beside two other suits filed seeking the same orders over the same subject matter by the deceased' purported administrator/previous spouse in Milimani High Court Commercial & Tax Division Case No. E472 of 2022, *Nancy Wairimu Waiganjo & Another v NCBA Bank Limited & Another* and Commercial Court Miscellaneous Civil Case No. E591 of 2024, *Nancy Wairimu Waiganjo v NCBA Bank Kenya Limited & Purple Royal Auctioneers*.

11. The Defendant/Respondent submitted that to deem a suit as res judicata, the elements that must crystalize are that the previous decision must be final and conclusive, the previous suit must have been before a court of competent jurisdiction, the present and prior suits must have been/be between the same parties, and that the matters in issue in the subsequent suit must arise from the present/same cause of action. That the doctrine of res judicata is not novel as several courts have pronounced themselves and it is well settled in its application. The Defendant/Respondent cited the cases of *Re BMK* (Miscellaneous Application No. 18 of 2020) (2023) KEHC 985 (KLR) (15 February 2023) (Ruling) where the court cited with authority the case of *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* (2015) eKLR, *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* (2014) eKLR, *Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* (Civil Appeal 9 of 2021) (Formerly at Environment and Land Appeal Case 1 of 2021) (2022) KEELC 1631 (KLR).
12. The Defendant/Respondent submitted that even where the court is inclined to consider other aspects beside the principal of res judicata, the orders sought are discretionary equitable remedies which demand that a litigant must come to court with clean hands. The Defendant Respondent placed reliance on *Kenleb Cons Ltd v New Gatitu Service Station Ltd & Another* (1990) eKLR and *John Onyango Akumu v Barclays Bank of Kenya Ltd* (2014) eKLR on what a party seeking injunction must demonstrate. The Defendant/Respondent urged the court to dismiss the suit with costs.
13. I have considered the Notice of Motion application dated 19th August 2024, the Notice of Preliminary Objection dated 30th September 2024 and submissions by the parties. The issues for determination are: -
 - a. Whether the Preliminary Objection is merited
 - b. Who should bear costs.
14. On the first issues, the court in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited* (1969) EA. 696 set out what constitutes preliminary objection as follows: -

“So far as I am aware, 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. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
15. Further, in *Quick Enterprises Ltd v Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999, the court held: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”



16. The Defendant/Respondent raised a preliminary objection that the instant suit offends the provision of Section 7 of the Civil Procedure Rules as the entire suit is res judicata. The Defendant/Respondent submitted that the Applicant has instituted numerous suits over the same parties and the same subject matter seeking identical prayers.
17. Section 7 of the Civil Procedure Act Cap 21 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 such issue has been subsequently raised, and has been heard and finally decided by such court.”
18. The ingredients to be satisfied in determining res judicata were set out in the case of Christopher Kenyariri v Salama Beach (2017) eKLR as follows: -
- “...the following elements must be satisfied...in conjunctive terms;
- a. The suit or issue was directly and substantially in issue in the former suit
 - b. Former suit between same parties or parties under whom they or any of them claim
 - c. Those parties are litigating under the same title
 - d. The issue was heard and finally determined.
 - e. The court was competent to try the subsequent suit in which the suit is raised.”
19. To decide whether a case is res judicata, the court is required to look at the pleadings and decisions of the previous case in comparison to the instant case. However, the Defendant/Respondent did not attach documents of the previous suits to show that the current suit is *res judicata*.
20. This court finds that it cannot be considered a pure point of law capable of disposing of a matter primarily where the court is called upon to look outside the pleadings to make a determination.
21. I find that the Notice of Preliminary Objection dated 30th September 2024 is not merited and the same is dismissed with costs.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 18TH DAY OF DECEMBER, 2024.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

No appearance Advocate for the Plaintiff/Applicant

No appearance Advocate for the Defendant/Respondent

Court Assistant – Mr. Samuel Shitemi

