**River Road School Limited & 2 others v Kenya Women Microfinance Bank Limited (Civil Case 5 of 2019) [2023] KEHC 334 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 334 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYERI**

**CIVIL CASE 5 OF 2019**

**FN MUCHEMI, J**

**JANUARY 26, 2023**

**BETWEEN**

**RIVER ROAD SCHOOL LIMITED ..... 1ST APPLICANT**

**HUTCHINSON GITHINJI WANJOHI ..... 2ND APPLICANT**

**GODFERY NGUNJIRI WANJOHI ..... 3RD APPLICANT**

**AND**

**KENYA WOMEN MICROFINANCE BANK LIMITED ..... RESPONDENT**

**RULING**

1. This application dated January 20, 2022 brought under Order 51 Rule 1 of the *Civil Procedure Rules* and Sections 1A, 1B, 3A and 63 of the *Civil Procedure Act* seeks for orders of an injunction restraining the respondent from dealing, interfering, alienating or otherwise disposing by public auction the 1st applicant's properties namely Title No Nyeri Municipality Block 1/1020 and Title No Nyeri Municipality Block 1/1021 in a public auction scheduled for January 26, 2022 pending the hearing and determination of the suit.

2. The application was opposed by the respondent who filed a Replying Affidavit and Grounds of Opposition sworn and dated January 24, 2022 respectively.

**The Applicants' case**

3. It is the applicants' case that the 1st applicant is the bona fide registered proprietor of the properties known as Title no Nyeri Municipality Block 1/1020 and Title No Nyeri Municipality Block 1/1021 whereas the 2nd and 3rd applicants are directors of the 1st applicant. The applicants state that the 3rd applicant is since deceased and his estate is currently undertaking succession in order to administer his estate.

4. On or about June 15, 2015, the 2nd & 3rd applicants entered into a loan agreement with the respondent wherein the respondent agreed to advance the 2nd & 3rd applicants a loan of Kshs 40,000,000/- of which the respondent disbursed a sum of Kshs 34,000,000/-, which was an amount less than what was agreed upon.

5. The applicants state that the respondent through its agents M/s Quickline Auctioneers moved to advertise the suit properties for sale by public auction on December 20, 2021 without undertaking a proper and open valuation of the properties and without issuing the relevant statutory notices as mandatorily anticipated by law. The applicants further aver that the sale has been scheduled for January 26, 2022 and the respondent is yet to follow the laid out procedures in exercising their power of sale.

6. The applicants state that they have paid an amount of Kshs 38,173,102.05/- which comprises as follows:-

    a. Kshs 21,632,749.05 paid prior to the filing of the suit

    b. Kshs 138,465.61/- paid on November 20, 2019 after filing of the suit

    c. Kshs 14,840,352.40/- paid on November 29, 2019 after filing of the suit

    d. Kshs 1,700,000/- paid on February 10, 2021 after filing of the suit

7. The applicants contend that the total paid is Kshs 38,311,567.06/- which surpasses the initial sum disbursed of Kshs 34,000,000/- as against the expected repayment period of 12 years. The applicants argue that from the current account statement issued by the respondent, they owe the respondent a sum of Kshs 32,220,133.66/- which amount when added to the sums already paid defies the in diplum rule. Further, the applicants argue that the statement of accounts provided is erroneous as it indicates the amounts disbursed on February 10, 2021 to be Kshs 1,169,432.13/- instead of Kshs 1,700,000/- indicated in the cheques dated February 6, 2021 and deposit slip dated February 10, 2021.

8. The applicants argue that the calculation of the said repayment amounts based on the loan amount of Kshs 40,000,000/- is erroneous in light of the fact that the respondent failed to disburse the entire amount indicated in the loan agreement. Thus the intended auction is pegged on the wrong figures and marred by serious omissions of due procedure and thus does not meet the requisites set by law for a valid public auction.

9. The applicants further state that they desire to settle their liabilities within the prescribed period but the same has been hindered by the death of the 3rd applicant and the failure to render the true account of the loan as disbursed.

10. In light of the above, the applicants contend that the said auction process is flawed and any action by the respondent ought to wait for the full hearing of the suit. Further, the mere dismissal of the application dated June 20, 2019 does not warrant the abandonment of due procedure and the court is enjoined to protect the interests of the applicants.

11. The applicants state that if the illegal sale goes ahead, the 1st applicant shall suffer irreparable loss that is not capable of compensation by way of damages as the same constitutes the applicant's matrimonial property and it is situated at a very prime area.

**The Respondent's Case**

12. The respondent states that the applicants are abusively using the court to prevent the respondent from carrying out its statutory right to realise the charge, despite the ruling of November 5, 2021. The

respondent argues that the current application is res judicata in view of the ruling given on November 5, 2021 which dismissed the applicants' application dated June 20, 2019 which was seeking similar prayers as the current application. The respondent further argues that the court did not issue any prohibitory orders and therefore there is nothing to be varied or set aside.

13. The respondent contends that all the statutory notices were served upon the applicants as she stated in her replying affidavit dated December 2, 2019 which she seeks to rely on entirely.

14. The respondent contends that it commissioned M/s Etwons Property Consultants Ltd, a firm valuer to undertake an independent valuation of the suit properties and the reports were submitted on November 15, 2021. The respondent further contends that it instructed M/s Quickline Auctioneers to realise the charge but denies that the exercise was illegally and irregularly carried out. The respondent states that the auction is being conducted by a licensed officer and it is exercising its statutory power of sale regularly within the parameters of law.

15. The respondent avers that as of January 24, 2022, the principal debtor, Othaya Teachers College, owes the respondent Kenya Shillings Thirty Three Million Three Hundred and Twenty One Thousand Four Hundred and Sixty Six and Eighty One Cents (Kshs 33,321,466.81/-). The respondent states that the applicants failed to disclose to the court that the principal borrower had an outstanding loan balance of Kshs 27,927,762.94/- as at February 11, 2021. The respondent further states that the sum of Kshs 14,840,352.40/- was not paid by the applicants but was a settlement made by the insurance company of the claim lodged by the respondent.

16. Moreover, the respondent states that the applicants have not put before the court anything new, which was not within the knowledge of the applicants or illustrated any grievance against the order made on November 5, 2021. The respondent contends that the applicants are undeserving of the equitable remedies sought. The respondent further states that all through the applicants have been aware of the realization process and the exercise is being carried out within the parameters of the law. Moreover, the respondent contends that it has a statutory right to sell the charged properties and there is nothing illegal in the prevailing circumstances to bar it from exercising this right. The 1st applicant charged the suit properties as a guarantor with the full knowledge and understanding that should the principal debtor, Othaya Teachers College, default in the loan repayment, the charged properties would be sold to answer the debt outstanding. The respondent further contends that the 1st applicant is frustrating the process as they have failed to discharge their obligation by defaulting payment.

17. The respondent contends that this being a court of equity, it should not come to the aid of the applicants as they have not been vigilant and they have not come to court with clean hands. Moreover, the respondent contends that the applicants will not suffer any loss or prejudice, if the orders sought are not granted as they still have an opportunity to competitively bid for the charged properties since they have been offered for sale at the public auction. The respondent further argues that they are not in breach of any statutory duty or obligation and they should be allowed to exercise their statutory power of sale over the charged properties without hindrance.

18. The respondent states that it incurred a sum of Kshs 350,000/- to stage the auction which was scheduled on December 20, 2021 and the same did not materialize as they were no adequate bids. The respondent further contends that it incurred a further sum of Kshs 375,000/- to stage the auction scheduled for January 26, 2022 which if aborted, will expose it to a further loss. The respondent argues that all the costs goes to accumulate the amount owing to the applicants and may become irrecoverable if they escalate to higher levels.

19. The respondent avers that the applicants have not made a *prima facie* case nor furnished an undertaking as to damages to warrant being granted the orders sought. The applicants are truly indebted to the

respondent, a fact which the applicants have acknowledged in writing. The respondent avers that the applicants are seeking for the court's assistance to buy more time, to default and obtain an order that they use to flush at the bank anytime they attempt to realize the charges, which goes against the spirit and terms of the lending contract and public policy. The respondent states that the applicants have had ample time to redeem the suit properties which they have failed to utilize and rushing to court in the last minute is an act of abuse of the court process.

20. The respondent argues that the application is incompetent and manifestly an abuse of the court process as it invokes the inherent jurisdiction of the court under Section 3A when the rules clearly provide specific provisions under which a party can move the court. Furthermore the respondent argues the application has no foundation to stand on and the application is meant to mislead the honourable court.

21. Parties disposed of the application by way of written submissions.

**The Applicants' Submissions**

22. The applicants submit that having made substantive payments during the pendency of the initial application dated June 20, 2019, the respondent ought to have provided fresh notices representing the fresh amounts owed to it pursuant to Section 90 (1) and (2) of the *Land Act* No 6 of 2012. The only statutory notices issued to the applicants are those dated August 6, 2018 and August 27, 2018 pegging the amount due at Kshs 33,247,987.81 yet the position as at January 2022 had changed as the applicants state that they had paid in an excess of Kshs 16,678,818/-. As such, the applicants contend that the said notices are defective and cannot be used to procedurally administer foreclosure. The applicants further argue that the said notices were bad in law and fact as they failed to adhere to strict provisions of Section 96 of the *Land Act* No 6 of 2012. To support their contention, the applicants rely on the case of *Robert Mwangi vs Springboard Capital Limited* [2018] eKLR.

23. The applicants submit that they paid an amount of Kshs 38,173,102.05/- and yet the amount the respondent seeks as outstanding as at January 24, 2022 is Kshs 33,321,466.81/-. The applicants argue that if the said demand were to be headed, the same would translate to a total of Kshs 71,494,568.86/- which defies the in diplum rule. The applicants argue that the said figure is grossly escalated and makes the yoke of debt unmanageable especially noting that the respondent failed to issue the agreed loan amount by Kshs 5,600,000/-. The applicants make reference to the cases of *Francis Mbaria Wambugu vs Jijenge Credit Limited* [2020] eKLR and *Mwambeja Ranching Company Limited and Another vs Kenya National Capital Corporation* [2019] eKLR and submits that the in diplum rule is meant to protect borrowers against the exploitation by lenders who permit interest to accumulate to astronomical figures.

24. The applicants contend that from the onset, the respondent failed in its obligation to disburse the loan amounts as indicated in the agreement and thus they cannot be said to be innocent in so far as their discharge of their duty is concerned. Further, the applicants contend that the entire loan period was 12 years and at the point of seeking the court's redress only a period of 4 years had been utilized with the applicants having paid Kshs 21,632,749.05/- and currently the applicants state that they have paid a total of Kshs 38,840,353/-.

25. The applicants further submit that the respondent was in default of Section 97(3) of the *Land Act* by skewing the value of the land to wit that its value was less in 2022 than it was in 2015. The applicants argue that the there are two conflicting valuation reports dated April 24, 2019 and May 11, 2015 which were all prepared at the behest of the respondent and the applicants urge the court to see the mischief as a move to defeat the 1st applicant's interest in the subject properties.

26. The applicants rely on the cases of *Mrao Limited vs First American Bank of Kenya Ltd* [2003] eKLR and *Nguruman Limited vs Jan Bonde Nielsen & 2 Others* [2014] eKLR and submit that they have established that they have a *prima facie*/ case to warrant the orders sought.

**The Respondent's Submissions**

27. The respondent states that it relies on its Replying Affidavit dated December 2, 2019 and Further Replying Affidavit dated March 9, 2021. The respondent relies on the case of *Giella vs Cassman Brown & Co Limited* [1973] EA 358 and submits that the applicants have not the satisfied the conditions to warrant them the orders sought. On the issue of a *prima facie* case, the respondent relies on the case of *Mrao Limited vs First American Bank of Kenya & 2 Others* (2003) KLR 123 and submits that the applicants have not demonstrated that they have a *prima facie* case with a probability of success. The respondent argues that the relationship between them and the applicants is contractual based on the Letters of Offer dated June 15, 2015, July 8, 2015 and the charge. The applicants entered into the contract voluntarily and therefore if and when the respondent's right to exercise the statutory right of sale arose due to default by the applicants, the court ought to enforce that intention as it is not the court's duty to rewrite the contract between the parties

28. The respondent submits that it was well within the law and contract to exercise its statutory right of sale and the applicants by signing the lending contract knew and consented to the respondent's right to exercise its power of sale in the event of default of payment of the loan. Furthermore, the applicants have admitted to being indebted to the respondent.

29. The respondent states that the realization process began in August 2018 and the applicants were served with all the requisite statutory notices. Moreover, the respondent states that the issue of service of the statutory notices was very prominent in the applicants' application dated June 20, 2019, which the court pronounced itself through the ruling dated November 5, 2021.

30. The respondent relies on the case of *Priscillah Krobougt Grant vs Kenya Commercial Finance Co Ltd and 2 Others*, Court of Appeal at Nairobi, Civil Application No Nai 227 of 1995 (108/95) (unreported) and submits that a dispute touching on the amount payable or interest chargeable without more is not a ground for restraining a charge from exercising its statutory power of sale.

31. The respondent argues that a guarantee is a continuing security and shall remain in force until the subject debt is satisfied. To support this contention, the respondent relies on the case of *Hosea Mundui Kiplagat vs Kenya Commercial Bank* (2021) eKLR. The respondent states that the principal debtor owes it Kshs 33,321,466.81/- as at January 24, 2022 which continues to accrue interest. The respondent submits that the applicants have diverted their business proceeds elsewhere instead of servicing the loan from December 2019 to date. Further, the applicants have tactfully admitted their indebtness to the respondent and confirmed their inability to pay. Moreover, the respondent submits that it has not infringed on the applicants' statutory rights and therefore it should not be prevented from giving effect to the statutory notices issued and realise the charge.

32. The respondent relies on Section 97(2) of the *Land Act* No 6 of 2012 and submits that it engaged the services of M/s Etwons Property Limited to conduct an independent valuation over the charged properties and they filed a report on November 15, 2021.

33. The respondent submits that the applicants voluntarily offered the suit properties as collateral security with the full knowledge and understanding that in the event of default of repayment of the loan, the suit properties would be sold to answer the outstanding debt. Furthermore, the respondent submits that it is trite law that once a property is offered as security, it becomes a commodity of sale whose loss

can be quantified and compensated adequately in damages. To support its contentions the respondent relies on the cases of *Peter Kamau Munene vs Kenya Commercial Bank Limited* [2015] eKLR, *Sammy Japheth Kavuku vs Equity Bank Limited & Another* [2014] eKLR and *Mrao Ltd vs First American Bank of Kenya Ltd* [2003] KLR 125.

34. The respondent submits that the applicants have not given any undertaking as to damages nor offered any security for due performance. The respondent further relies on the case of *Simon Njoroge Mburu vs Consolidated Bank of Kenya* (2014) eKLR and submit that the value of the charged property is ascertainable and the applicants can be compensated by way of damages. Further, the respondent states that it is a sound financial institution with a vast asset base and would be in a position to recompense.

35. The respondent submits that the applicants have failed to disclose about their previous application dated June 20, 2019 which was dismissed by the court vide its ruling dated November 5, 2021. The current application raises similar issues as the earlier application and thus the respondent submits that filing multiple applications is an abuse of the court process. Further, the court canvassed the issues raised in the earlier application in its ruling delivered on November 5, 2021. The issues raised in the instant application are similar and as such this application is *res judicata*. It is further argued that this court having made a determination vide its ruling dated November 5, 2021, it cannot re-open for scrutiny the same issues in this application. The respondent submits that the allegations of abandonment of procedure raised by the applicants remain unsubstantiated allegations. The respondent relies on the case of Nairobi High Court Misc Application No 241 of 2019 *Nyandoro & Co Advocates vs National Water Conservation & Pipeline Corporation* and submits that the applicants' conduct amounts to forum shopping which delays the course of justice and constitutes an abuse of the court process.

36. On the issue of balance of convenience, the respondent submits that if the injunctive orders are granted, it stands to suffer a disadvantage more than the applicants as they remain in complete default of their obligations under the lending contract. The respondent argues that the applicants have shown tendencies of failing to honour their contractual obligations and if an injunction is granted, the value of the suit properties might turn out to be insufficient to satisfy the debt.

37. The respondent submits that an injunction is an equitable remedy and the party seeking it must come to court with clean hands. The respondent makes reference to the case of *Kyangaro vs Kenya Commercial Bank Ltd & Another* (2004) 1 KLR 126 and submits that the applicants' conduct of attempting to circumvent the dismissal order given on November 5,2021 is below the standard required of a litigant coming to a court of equity.

**The Law**

Whether the matter is *res judicata*

38. The doctrine of *res judicata* is set out in Section 7 of the *Civil Procedure Act*. The doctrine ousts the jurisdiction of a court to try any suit or issue which had been fully determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title. Section 7 of the *Civil Procedure Act* 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.

39. This principle was enunciated in the Court of Appeal in the case of The *Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR where the court 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 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.

40. The Court went on to state on the role of the doctrine:-

The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation an 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 commonsensical protection against the wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and for a, 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 or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.

41. In the application dated June 20, 2019 the applicants sought temporary injunction restraining the respondent from interfering, alienating, disposing, selling or otherwise dealing with land Title No. Nyeri Municipality Block 1/1020 and Nyeri Municipality Block 1/1021 pending the hearing of the suit. The applicants in this application seek for the same injunctive orders to restrain the respondent from selling the same properties by way of public auction. In the application dated June 20,2019 the applicants argued that the respondent did not disburse the full amount of the loan namely Kshs 40,000,000/= but instead disbursed Kshs 34,400,000/=. the applicants further argued that the rate of interest indicated in the loan agreement of 20% was excessive; that computation of the repayment amounts was erroneous in light of the fact that the entire amount applied for was never disbursed; that the respondent did not issue statutory notices as required for under Section 90(1) of the *Land Act*; that the respondent skewed the value of the land as they were two conflicting valuation reports dated 24/04/2019 and 11/05/2015 thus resulting in the intended auction being pegged on the wrong figures thereby the sale would be unlawful and unprocedural. In the current application, the applicants have essentially made similar arguments.

42. The court in its ruling on the earlier application dated June 20, 2021 made clear findings and determination on all the issues raised therein. The application was dismissed for reasons that it had no merit in that the requirements for an application for injunction were not established. The applicants in this application have brought the same prayers, the same arguments and placed the same material before the court. The question is whether the applicants expect a different outcome from this court in the event that this court was to delve into the merits of this application.

43. Consequently, I reach a conclusion that this application is *res judicata* and ought not to be entertained for it was heard and determined by this court which is a competent court. The parties were the same in both applications, between the same parties and with similar issues.

44. This application dated January 20, 2022 is hereby struck out with costs to the respondents.

45. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 26TH DAY OF JANUARY, 2023.**

**F MUCHEMI**

**JUDGE**

**RULING DELIVERED THROUGH VIDEOLINK THIS 26TH DAY OF JANUARY, 2023.**