Chuma v Equity Bank Limited & 2 others (Civil Suit 15 of 2022) [2023] KEHC 3368 (KLR) (24 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3368 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL SUIT 15 OF 2022

RN NYAKUNDI, J

APRIL 24, 2023

BETWEEN

ENOCK KIPLAGAT CHUMA ..... PLAINTIFF

AND

EQUITY BANK LIMITED ..... 1ST DEFENDANT

MERCY BOYON T/A RAZOR SHARP AUCTIONEERS ..... 2ND DEFENDANT

TRANSCOUNTRY VALUERS LIMITED ..... 3RD DEFENDANT

RULING

1.

a. Spent

b. That this Honourable court be pleased to grant an order of injunction restraining the 1st and 2nd defendants whether by themselves, or its authorized agents, auctioneers and or any of them or otherwise from offering for sale, selling by public auction or private treaty of those parcels of land namely L.R No. Burnt Forest/65 & Burnt Forest Township/66 – Uasin Gishu County pending the hearing and the inter parties hearing of this application inter parties.

c. That this Honourable court be pleased to grant an order of injunction restraining the 1st and 2nd defendants whether by themselves, or its authorized agents, auctioneers and or any of them or otherwise from offering for sale, selling by public auction or private treaty of those parcels of land namely L.R No. Burnt Forest/65 & Burnt Forest Township/66 – Uasin Gishu County pending the hearing and determination of the main suit.

d. That the court be pleased to order for the valuation of the two properties and furnish the report to court.

e. That the Plaintiff/Applicant be allowed to liquidate the outstanding loan arrears by way of reasonable instalments.

f. That costs of this application provided for.

2. The application is premised on the grounds set out therein and the contents of the supporting affidavit.

3. The Applicant's case is that he is the owner of the land known as L.R No. Burnt Forest/65 & Burnt Forest Township/66 – Uasin Gishu County. the 1st defendant, without following due process as envisaged under the *Land Act* section 96 and 97, proclaimed the said land with the intention of offering the suit land for sale. The Applicant contends that the amount claimed by the Respondents has not been particularised or detailed accounts thereof given.

4. The 1st defendant has scheduled an auction for November 30, 2022 and therefore the parcel of land is in danger of being sold by the Respondent and the Applicant will suffer irreparable loss as the charged properties have been undervalued. He is willing to clear the outstanding balance by way of instalments once the accounts are reconciled.

5. The Respondents opposed the application vide a replying affidavit sworn on November 25, 2022 by Timothy Biwott. They contend that the Application is *res judicata* and that the application has not met the threshold for the orders sought to be granted. The Application herein is similar to the one determined by the subordinate Court in Eldoret CMCC No.569 of 2020. The Application is a reincarnation of the application dated June 30, 2022 as Orders sought in the Lower Court are similar to the orders sought in the current Application and having heard the Parties on merit and delivered a considered Ruling. It offends the provisions of section 7 of the *Civil Procedure Act*, 2010.

6. The Respondent contended that the parties had litigated on the matter at the Subordinate Court and by swearing a Verifying Affidavit deposing that there have never been any such proceedings, the Plaintiff has deliberately misled the Court and perjured himself which is an abuse of the Court's process.

7. that the Plaintiff in the lower Court suit filed the same while aware of the jurisdiction of that court and in his Plaint at Paragraph 11 averred that the said court had jurisdiction as the course of action is the outstanding loan facility to the tune of Kshs 12,129,797.88/= which sum is within the pecuniary jurisdiction of the Senior Principal Magistrate who handled the matter and stayed the sale that was scheduled for 4th August 2022

8. With the filing of the current suit, it has become clear that the withdrawal of the Subordinate Court suit without the Consent of the 1st Defendant was not out of good faith anchored on the issue of pecuniary jurisdiction but was clearly aimed at allowing the Plaintiff to have a second bite at the cherry by forum shopping in this court with the aim of further delaying the intended exercise of the 1st Defendant's statutory power of sale.

9. Citing *Giella v Cassman Brown & Co. Ltd* (1973) EA 358 at page 360, the Respondent submitted that the Plaintiff having approached the Court for orders of injunction which are equitable remedies granted at the discretion of the court and to benefit from the equitable remedy he/she must comply with the principles of equity.

10. Further, the Respondent contended that that the Plaintiffs application and entire suit does not meet this first threshold for grant of an injunction as the Plaintiff has not established any prima facie with a probability of success in the suit, application and submissions. The loan arrears not being in dispute as indicated in the account statements annexed and marked TB-7 (a) & (b) and TB-13, the plaintiff

cannot establish a *prima facie* case with a probability of success. See *Kenya Breweries Ltd v Okeyo* 2002 1 EA quoted in *John Edward Ouko v National Industrial Credit Bank Ltd* [2013] eKLR.

11. The Defendants have proved that all statutory notices were issued and posted and that in addition, the provisions of section 97 of the *Land Act* were complied with since a valuation report was undertaken. All these documents were annexed to the Replying Affidavit in the Lower Court that was duly served on the Plaintiff s advocates.

12. On the issue of valuation as contained under prayer (d) of the Application, the Respondents submitted that a dispute as to the value of the suit property cannot form a basis for grant of an injunction as having surrendered his property as collateral for the1 loan turned it into a commodity whose value will still be ascertainable after sale and a remedy in damages shall be available in the event the valuation is found to have been wrong.

13. No irreparable loss incapable of being compensated by award of damages has been established as in the event this court finds that the 1st Defendant ought not to have sold the Plaintiffs land, then any loss that may have been suffered by the plaintiff could be compensated in damages and being bank with great repute, goodwill, credibility and financial ability within East Africa, the 1st Defendant shall be able to pay the plaintiff any damages that he may suffer in the unlikely event that this Court finds merit in the main suit.

14. The balance of convenience your Lordship lies with the Defendants for they have not breached any of the plaintiff's rights. On his part, the Plaintiff has breached his contractual duty by defaulting in his loan repayment.

Analysis for Determination

15. The issues that arise in the present application are as follows;

    a. Whether the application is res judicata

    b. Whether the application meets the threshold for orders of stay to be granted

Whether the Application is Res Judicata

16. Section 7 of the *Civil Procedure Act* states 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."

22. The *Civil Procedure Act* also provides explanations with respect to the application of the *res judicata* rule. Explanations 1-3 are in the following terms:

> Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.
>
> Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

23. In so far as our jurisprudence is concerned, the condition precedents pursuant to section 7 of the *Civil Procedure Act* are now well settled as instructive of the following authorities: In the case of Njangu v Wambugu and another Nairobi HCC No 2340 of 1991 (unreported) held that: " if parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lifts on every occasion he comes to court, then, I do not see the use of doctrine of res-judicator...similarly in the case of *Siri Ram Kaura v M.J.E Morgan*, CA 71/1960(1961) EA 462 the then EACA stated that " "The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...

24. The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...

The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.

It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit."

25. I have perused the annexures to the replying affidavit and my attention is drawn to annexure TB-1 (a) (b) and (c) and I note that there is an application that was filed on the Chief Magistrates' court dated 30th June 2022 seeking stay orders over the subject suit land and the same was between the Applicant herein and the 1st defendant. It is apparent that the matter in issue is similar. Further, it is evident that the matter has been directly in issue in a former suit between the same parties. In the persuasive case of *Carl Zeiss Stifting v Raymer & Keerl Ltd* No. 3 EWCA. I am of the considered view that the doctrine of Estoppel applies to the facts of this case as stated by Buckley J as follows: " That a party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action and which is embodied in a judicial decision tht is final, is conclusive in a second action between the same parties and their privies. The principle applies whether the point involved in the earlier decision is one of fact or law or a mixed question of fact and law."

26. The matter has to have been determined by a court of competent jurisdiction for it to be considered *res judicata*. I have perused annexure TB-4 it is my view that the subordinate court made a finding in the application for stay that is similar in substance to the present application and that it was clothed with the requisite jurisdiction to make such finding. In his plaint in the trial court, the Applicant had stated that the cause of action was the outstanding loan facility to the tune of Kshs 12,129,797.88/= which sum is within the pecuniary jurisdiction of the Senior Principal Magistrate who handled the matter. It

is in those circumstances I am afraid the *locus classicus* of *res judicata* in *Henderson v Henderson* (1843) 3 Hare 100. Carries the day

27. In the premises, the matter is res judicata and the application is unmerited. The Applicant is attempting to appeal through the backdoor, an action that this court cannot be seen to allow.

Whether the Application Meets the Threshold for Orders of Stay of Execution

28. It is a trite law that there are those conditions to be met before an interlocutory injunction can be granted as exposited in *Giella v Cassman Brown Co. Ltd* 1973 E.A. 358.

> " First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience."

29. In the case of *American Cynamid Co. v Ethicon Ltd* (1975) AC 396 Lord Diplock observed as follows: " the governing principle is that the court should first consider whether , if the plaintiff were to succeed at trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable would be an adequate remedy and the defendant would be in in a financial position to pay them, no interim injunction should normally be granted, however strong the plaintiff's case appeared to be at that stage".

30. The potential effect of the Applicant's application for an injunction may be very well or within the scope of the principles in *Halsbuy's Laws of England*, Volume 24(2004). At paragraph 843 which states as follows: " That an injunction may be refused on the ground of the plaintiff's acquiescence in the defendant's infringement of his right. The principles on which the court will refuse interlocutory or final relief on this ground are the same, but a stronger case is required to support a refusal to grant final relief at the hearing. The fact that a person did not interfere to prevent a small and limited breach does not preclude him for all time in respect of a wider and more important breach. If a person stands by and knowing, but passively encourages another to expend money under an erroneous belief as to his right, and then comes to the court for relief by way of a perpetual injunction, it will be refused and he will be left to his remedy, if any, in damages.

31. Giving effect to the above principles an injunction restraining the defendant by itself, or his agents/ servants or otherwise howsoever from enforcing the mortgagor and mortgagee contract lacks merit. The upshot of it is the failure by the applicant to meet the critical threshold for any of the remedies to be granted. Costs to the Respondent.

DATED AND DELIVERED VIA –EMAIL AT ELDORET THIS 24 DAY OF APRIL 2023

.....

R. NYAKUNDI

JUDGE

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