



REPUBLIC OF KENYA



KENYA LAW
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**Kivai v KCB Bank Limited & 2 others (Civil Case 1 of 2022)
[2023] KEHC 22876 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22876 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL CASE 1 OF 2022
JN KAMAU, J
SEPTEMBER 28, 2023**

BETWEEN

ERNEST OGESI KIVAI PLAINTIFF

AND

KCB BANK LIMITED 1ST DEFENDANT

KAVUCA HOLDINGS LIMITED 2ND DEFENDANT

NYALUONYO AUCTIONEERS 3RD DEFENDANT

RULING

1. In his Notice of Motion application dated and filed on September 19, 2022, the Plaintiff herein sought that an order of temporary injunction be issued restraining the 1st and 3rd Defendants, their agents and/or employees and/or servants from offering for sale in the public auction that was scheduled for September 21, 2022 or by any other public auction or private sale, selling, transferring or in any way dealing with the properties known as LR No S/Maragoli/Chageda/220, LR No S/Maragoli/Chageda/1250, LR No Tigoi/555, LR No Isukha/Shirere/5048, LR No Isukha/Shirere/5049, LR No Isukha/Shirere/5050 and LR No Isukha/ Shirere/5051 (hereinafter referred to as “ the subject properties”)pending the hearing and determination of the suit herein.
2. On September 22, 2022, Musyoka J directed that the said Notice of Motion application be heard on October 19, 2023 and extended interim orders until the said date.
3. In response to the said application, Edward Siya, the 1st Defendant’s Recoveries Manager, swore a Replying Affidavit on behalf of the 1st and 3rd Defendants on November 28, 2022. The same was filed on December 1, 2022. On the same date, the 1st and 3rd Defendants filed a Preliminary Objection also dated November 28, 2022 on the ground that this court lacked jurisdiction to hear and determine the aforesaid Notice of Motion application and that the same lacked merit, was misconceived, frivolous,



embarrassing, scandalous, vexatious and an abuse of the court process which called for its dismissal with costs.

4. The 1st and 3rd Defendants' Written Submissions were dated July 3, 2023 and filed on July 5, 2023 while those of the Plaintiff were dated March 20, 2023 and filed on March 29, 2023. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

5. Although the parties asked this court to give a Ruling in respect of the 1st and 3rd Defendants' Preliminary Objection only and they filed Written Submissions in respect of the said Preliminary Objection, it was clear from the directions of PJ Otieno J of March 23, 2023 that the said Preliminary Objection was to be heard in opposition to the Plaintiff's said Notice of Motion application.
6. The court has a duty to facilitate the efficient disposal of disputes before it so as not to strain the already scarce resources. The court must therefore very quickly remove any matter that may have the potential of clogging its system and causing backlogs if it can be determined right at the outset it would be prudent to hear applications simultaneously rather than piecemeal.
7. The court is enjoined to facilitate the just determination of the proceedings, the efficient disposal of the business of the court, the efficient use of the available judicial and administrative resources, the timely disposal of the proceedings, and all other proceedings in the court at a cost affordable by the respective parties as provided in Section 1B of the [Civil Procedure Act](#).
8. It was against that backdrop that this court proceeded to determine both the 1st and 3rd Defendants' Preliminary Objection together with the Plaintiff's Notice of Motion application despite the parties not having filed their respective Written Submissions regarding the orders the Plaintiff had sought therein.

I. Preliminary Objection

9. The 1st Respondent submitted that the present application was res judicata as a similar application had already been heard and determined. It relied on the case of [Uhuru Highway Development Ltd vs Central Bank of Kenya & 2 Others](#) [1996] eKLR and several other cases it had cited where a similar conclusion had been arrived at. It also placed reliance on Section 7 of the [Civil Procedure Act](#) Cap 21 (Laws of Kenya) that explains what constitutes the principle of *res judicata*.
10. It further argued that the Plaintiff and his spouse had unclean hands and were guilty of the abuse of the court process as they had filed several suits seeking to restrain it from exercising its statutory power of sale. It accused them of forum shopping which it asserted was an interference with the administration of justice and abuse of the court process which should be stopped forthwith.
11. In addition, it relied on the case of [Kenya Commercial Bank Limited vs Benjob Amalgamated Limited](#) [2017] eKLR where it was held that litigation must come to an end.
12. On the other hand, the Plaintiff was emphatic that the Environment and Land Court (ELC) did not have jurisdiction to hear and determine this matter because the dominant issue herein involved mortgages which was within the jurisdiction of the High Court as was held in the case of [Co-operative Bank of Kenya Limited vs Patrick Kangéthe Njuguna & 5 Others](#) [2017] eKLR. He therefore urged this court to dismiss the said Preliminary Objection.
13. Both the Plaintiff and the 1st and 3rd Defendants were not of the same mind regarding the question of this court's jurisdiction. Notably, the 1st Respondent's Preliminary Objection did not specify why



this court lacked jurisdiction to hear the present application. This only emerged from its Written Submissions. While it argued that this court lacked jurisdiction to deal with the application as the same was res judicata, the Plaintiff submitted that the High Court had jurisdiction to hear and determine the matter as the issues he had raised were outside the realm of the ELC.

14. Be that as it may, as this court agreed with the Plaintiff that the High Court was seized of jurisdiction of this matter, a fact that the 1st and 3rd Defendants did not appear to have objected to, this court did not find it necessary to belabour the point. It therefore limited itself to the question of whether or not the present application and/or suit was an abuse of the court process by virtue of the same having been res judicata.
15. According to the Replying Affidavit of Edward Siya, one Pamela Njoki Karanja, a Director of the 2nd Defendant herein had sought several financial facilities from the 1st Respondent herein. The Plaintiff herein and one Catherine Kigasia Kivai executed a Deed of Guarantee and Indemnity dated 22nd October 2014 limited to the principal sum of Kshs 33,750,000/=. The said Pamela Njoki Karanja executed a Deed of Guarantee and Indemnity limited to the principal sum of Kshs 2,000,000/=. Both Pamela Njoki Karanja and Catherine Kigasia Kivai were the Plaintiff's spouses and both executed the affidavits of spousal consents in respect of the charges over different subject properties.
16. On July 10, 2017, the said Catherine Kigasia Kivai filed suit against the Plaintiff and the 1st Defendant herein in HCCC No 20 of 2018 (Formerly ELC No 138 of 2017 (Kakamega) *Catherine Kigasia Kivai vs KCB Ltd & 4 Others* seeking to restrain the 1st Defendant from exercising its statutory power of sale over the subject properties. This suit was dismissed on March 22, 2021 for want of prosecution after the plaintiff therein, the said Catherine Kisagai Kivai failed to pay throw away costs in the sum of Kshs 30,000/= and to fix the suit for hearing.
17. On July 5, 2019, Pamela Njoki Karanja filed Busia CMCC (ELC) No 84 of 2019 seeking the injunctive orders against the 1st Defendant herein in respect of the subject properties. The court therein issued temporary injunctive orders pending the hearing and determination of the said suit, which suit was still pending hearing and determination. It was not clear what the status of this case was.
18. However, it was apparent that the Plaintiff was well aware of the suits his spouses filed in different courts in respect of the said subject matters. He failed to disclose the existence of these suits in the present suit. In his Verifying Affidavit that he swore on September 19, 2022, he stated as follows:-

“That there is no suit pending in any court between the parties hereof in respect of the same subject matter”
19. On February 23, 2023, P J Otieno J directed the Plaintiff to file Written Submissions first whereafter the Defendants would then file theirs. He also granted the Plaintiff leave to file a rejoinder to the Defendants' said Written Submissions. Despite the 1st and 3rd Defendants having raised the issue of res judicata in their said Written Submissions, the Plaintiff failed to rebut the same by way of Written Submissions or by way of further affidavit evidence.
20. Suffice it to state that from the 1st and 3rd Defendants' Replying Affidavit, Busia CMCC (ELC) No 84 of 2019 appeared to have been pending hearing and determination after injunctive orders were granted.
21. Courts must exercise restraint and must never entertain matters that are pending before other competent courts irrespective of their level of hierarchy. This is to guard against courts embarrassing each other by issuing conflicting decisions and to prevent litigants from forum shopping once they did not get favourable orders. Litigation must come to an end at some point.



22. The Plaintiff herein had sought an equitable relief. He was thus expected to disclose all material facts. However, he had unclean hands for failing to disclose the existence of the previous suits over the same subject matter. There was no doubt in the mind of this court that the present suit was an abuse of the court process as the issues that the Plaintiff had raised herein had been directly and substantially in issue in former suits between the same parties before courts that were competent to try the same. In fact, Busia CMCC (ELC) No 84 of 2019, was still pending for hearing and determination, if not yet concluded as of now.
23. Notably, Section 6 of the *Civil Procedure Act* states that:-
- “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
24. Further, Section 7 of the *Civil Procedure Act* provides 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 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.”
25. In the case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* [1969] EA, it was held that a preliminary objection could not be raised if any fact had to be ascertained or if what was sought was the exercise of judicial discretion.
26. In the case of *Hassan Ali Joho & Another vs Suleiman Said Shabal & 2 Others* [2014] eKLR, it was also held that a preliminary objection consisted of a point of law which if argued, could dispose of the suit.
27. In the absence of any evidence to the contrary, whichever way this court looked at the Plaintiff's present application, it was clear that this court had no jurisdiction to open up the matter to hear and determine the question of the charges that were registered in respect of the subject properties which were extensively set out in Paragraphs 10 - 14 of his Plaint as the same were sub judice in Busia CMCC (ELC) No 84 of 2019.
28. This court could not, however, with certainty ascertain if the matter herein was res judicata for the reason that HCCC No 20 of 2018 (Formerly ELC No 138 of 2017 (Kakamega) *Catherine Kigasia Kivai vs KCB Ltd & 4 Others* was dismissed for want of prosecution before it could be heard on merit after the plaintiff therein, the said Catherine Kigasia Kivai did not comply with the conditional injunction that she had been granted pending the hearing and determination of the suit therein.
29. In this regard, this court had no option but to down its tools as was expounded in the case of *Owners of Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd* [1989] eKLR where it was held that the court had to down its tools once it determined that it had no jurisdiction to deal with a matter.
30. Notably, the 1st and 3rd Defendants did not furnish this court with proof that the issues the Plaintiff herein had raised in the suit herein had been fully determined on merit in another suit, Dismissal of HCCC No 20 of 2018 (Formerly ELC No 138 of 2017 (Kakamega) *Catherine Kigasia Kivai vs KCB*



Ltd & 4 Others was on a technicality. The suit could be reinstated upon a successful application made to the court.

31. This Court therefore sound and held that it could only down its tools if the matter was res judicata which the 1st Defendant did not demonstrate as it contended. The only inference this court got was that the matter may have been sub-judice but with no explicit proof of the same.

II. Notice of Motion Application

32. This court considered both the averments in the Plaintiff's Supporting Affidavit and in the Plaintiff and noted that his main contestation was that he was not issued with the statutory notices. However, this court perused the 1st and 3rd Respondents' Replying Affidavit and the enclosures thereto and noted that contrary to his assertions, the 1st and 3rd Defendants and M/S Legacy Auctioneers Services actually complied with the issuance of the statutory notices. As the Plaintiff did not demonstrate that the same did not comply with the provisions of the law, this court came to the firm conclusion that the said Statutory Notices were valid and lawful.
33. This court was also satisfied that the Plaintiff and his two (2) spouses, the said Pamela Njoki Karanja and Catherine Kigasia Kivai were duly served with the said Statutory Notices. This was evidenced in copies of the Certificates of Postages that the 1st Defendant annexed to its Replying Affidavit showing all their names.
34. Having issued proper notices in the first instance, the 1st Defendant was not obligated to issue fresh notices. It was, however, required to ensure that its auctioneers issued adequate notices for advertisement of the subject properties so as not to fetter the Plaintiff's and 2nd Defendant's equity of redemption.
35. In addition, the 3rd Defendant was required to comply with the provisions of Rule 1(b)(x) of the Auctioneers Rules, 1997 which states that:-

“ A court warrant or letter of instruction shall include, in the case of immovable property, the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.”
36. Although the Plaintiff did not raise this issue, it was instructive to note that the Valuation Report by Kenval Realtors was dated June 25, 2021. It was valid until June 25, 2022. The 3rd Defendant's advertisement of public auction showed that the subject properties were to be sold on September 21, 2022. There was therefore no valid valuation as at the time the 3rd Defendant advertised the subject properties for sale. The 1st and 3rd Defendants were therefore required to have complied with the provisions of Rule 11(1)(b)(x) of the Auctioneers Rules.
37. Failure to comply with the provisions of Rules 11(1)(b)(x) of the Auctioneers Rules was not a reason to grant injunctive orders. If the omission was remedied, there would be nothing to listen to in the main suit as there would be no sub stratum.
38. An interlocutory injunction can only be granted therefore if an applicant demonstrates that it had satisfied the three (3) prerequisites that were set out in the case of *Giella vs Cassman Brown* [1973] EA 358 at pg 360. These are that it has a *prima facie* case with a probability of success, that if the interlocutory injunction is not granted it will suffer irreparable injury, which would not adequately be compensated by an award of damages and that if the court is in doubt, it will decide the application on a balance of convenience.



39. This court was cautious not to re-open litigation on the basis of a fresh suit that had metaphorsised as a fresh cause of action but whose result would be to restrain the 1st Defendant from from realising its securities after its statutory right of sale of the subject properties had already crystallised.
40. Bearing in mind that the Plaintiff herein had unclean hands for material non-disclosure as aforesaid, the fact that there was no dispute to hear if the 1st and 3rd Defendants complied with the provisions of the law and the fact that he did not demonstrate that he had been met the threshold that was set out in the said case of *Giella vs Cassman Brown (Supra)*, this court came to the firm conclusion that he was not entitled to an order of injunction (2) as he had sought in his Notice of Motion application.

Disposition

41. For the foregoing reasons, the upshot of this court's Ruling was that the 1st and 3rd Defendants' Preliminary Objection dated November 28, 2022 and filed on December 1, 2022 was not merited and the same be and is hereby dismissed.
42. Having said so, the plaintiff's notice of motion dated and filed on September 19, 2022 was not merited and the same be and is hereby dismissed.
43. As the Plaintiff and the 1st and 3rd Defendants' were not successful in their Notice of Motion application and Preliminary Objection respectively, they will bear their own costs of the application.
44. For the avoidance of doubt, it is hereby directed that the 1st Defendant will be at liberty to exercise its statutory power of sale on condition that it strictly complies with the provisions of the *Land Act* No 6 of 2012 and the *Auctioneers Rules, 1997*. If the 1st and 3rd Defendants do not comply with the law, the Plaintiff will be at liberty to seek recourse of this court to safeguard his right for redemption of the subject properties.

It is so ordered.

DATED, SIGNED AND DELIVERED AT VIHIGA THIS 28TH DAY OF SEPTEMBER 2023

J. KAMAU

JUDGE

