Chepsiror v National Bank of Kenya & another (Civil Case E26 of 2021) [2022] KEHC 12242 (KLR) (27 June 2022) (Ruling)

Neutral citation: [2022] KEHC 12242 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL CASE E26 OF 2021

EKO OGOLA, J

JUNE 27, 2022

BETWEEN

DAVID KIPKOROS CHEPSIROR .... PLAINTIFF

AND

NATIONAL BANK OF KENYA .... 1ST DEFENDANT

KEYSIAN AUCTIONEERS .... 2ND DEFENDANT

RULING

Introduction & Background

1. Vide a Notice of Motion dated the 25th of November 2021, the plaintiff/applicant approached this court seeking a temporary injunction against the defendants restraining them from selling, disposing off, advertising, transferring, alienating or dealing whatsoever with property known as Kapsaret/ kapsaret Block 6(kamoson)/6 (suit property), pending the hearing and determination of the suit herein.

2. The factual matrix leading to the instant application as can be gleaned from the supporting affidavit of the plaintiff sworn on even date. The application is that the plaintiff was advanced a total of Kshs 1,500,000 on diverse dates in 1994, 1995 and 1996 by the 1st defendant and in turn, provided the suit property as security. He therefore deposited the title to the suit property with the 1st defendant. However, he defaulted in servicing of the loan and in 1998, the defendant attempted to exercise its statutory power of sale but the plaintiff herein filed proceedings to stop the same. The case was however dismissed.

3. The 1st defendant however failed to initiate execution proceedings against the plaintiff herein until December of 2021 by exercising its statutory power of sale necessitating the plaintiff to file the instant suit and the instant application.

4. The application was premised on grounds that the applicant is the registered owner of the suit property and that the defendants/respondents intend to unlawfully sale the suit property by public auction that was initially slated for the 6th of December 2021 but the court granted interim orders pending the determination of the instant application.

5. The applicant's contention is that he was never issued with any statutory notices as required by law nor was he issued with redemption notices for notification of sale. Rather, his position is that he has substantially repaid his loan and that the intended sale is therefore fraudulent.

6. The application was opposed by the defendants vide grounds of opposition dated the 9th of December 2021 and a replying affidavit sworn on the same date by one Onesmus Mbuvi, the 1st defendant's credit and remedial analyst. In particular, the defendants averred that the application is frivolous, vexatious and an abuse of the court's process. Majorly, their main ground of opposition was that the application herein is res judicata having been heard and determined in Eldoret HCCC No. 14 of 1998 where an interim order similar to the one the applicant seeks herein was granted and later discharged after the plaintiff failed to prosecute his application for injunction.

7. The defendants confirmed that indeed the 1st defendant advanced loan to the plaintiff/applicant herein but he failed to service the same resulting in the action by the 1st defendant to attempt to exercise its statutory power of sale which was stopped by court in 1998. Afterwards, the court discharged the interim orders. It was the 1st defendant's averment that they continued to engage the plaintiff to redeem his property but the plaintiff kept making promises that went unfulfilled. In this regard, the defendants attached letters from the plaintiff promising payments and which are marked OKM 5(a) –(c).

8. As a result of the plaintiff's continued default and unfulfilled payment proposals and undertakings, the 1st defendant averred that it opted to make another attempt at exercising its statutory powers of sale and to this end, issued a 90-day statutory notice to the plaintiff on the 5th of March 2018. The notice and certificate of postage were annexed and are marked OKM 6(a) & (b). The 1st defendant however averred that the notice did not elicit any response from the plaintiff and as such, the 1st defendant issued a 40-day statutory notice to the plaintiff on the 1st of November 2018.

9. The same did not elicit any response and the 1st defendant was forced to issue a fresh 40-day statutory notice dated the 5th of August 2021 pursuant to section 96 of the *Land Act* after the lapse of the aforementioned notices. The 1st defendant then averred that it carried out a valuation of the property through Nile Real Appraisers and instructed thereafter the 2nd defendant to proceed and serve the plaintiff with a redemption notice.

10. Upon receipt of the same, the 1st defendant deponed that the plaintiff through letters dated the 4th of October 2014 and 1st November 2021 wrote to the 1st defendant making payment proposals which were rejected necessitating the plaintiff to file the instant suit.

11. The defendants were categorical that the plaintiff entered into a contractual agreement with the 1st defendant voluntarily and should therefore pay its dues.

12. In rejoinder, the plaintiff filed a supplementary affidavit sworn on the 10th of January 2022 wherein he admitted to filing the suit in 1998 which was dismissed and an interlocutory judgement granted in favour of the 1st defendant. However, he contended that since 17 years have lapsed with no action from the 1st defendant, the 1st defendant's statutory power of sale extinguished in 2017 by operation of law after the lapse of more than 12 years. He therefore averred that the purported exercise and intended sale is a nullity. Finally, he noted that he has paid over Kshs 1,300,000 and does not know the actual balance as he has never been supplied with bank statements.

13. The court directed that the matter be canvassed by way of written submissions. The parties filed their respective submissions.

Determination

14. Upon careful consideration of the parties pleadings, submissions and annextures, I find that the singular issue that arises for disposal is whether the plaintiff/applicant has met the threshold for grant of the orders sought.

15. But before proceeding to this issue, let me address the opposition raised by the defendants in their grounds of opposition that the instant application is res judicata. In particular, the respondents/defendants averred that the application herein raises issues that have been dealt with by a court of competent jurisdiction in Eldoret HCCC No. 14 of 1998 and which have not been appealed or reviewed and the application is therefore Res judicata

16. Section 7 of the *Civil Procedure Act* on res judicata, reads 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."

17. The provision is on the fundamental doctrine that there should be an end of litigation. The doctrine of res judicata may be pleaded by way of estoppel so that where a judgment has been given future and further proceedings are estoppel. The rationale for the doctrine of res judicata exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.

18. Res judicata is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier judgment, which may have determined the questions of law as well as of fact between the parties. In other words, res judicata will successfully be raised as a defence if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction.

19. In that respect, the Court of Appeal held in The *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR that:

    [F] or 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.

20. 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 and 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 wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, 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."

21. Finally, in *Tee Gee Electrics and Plastics Company Ltd vs. Kenya Industrial Estates Limited* [2005] KLR 97 the Court stated:

> "Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata. The last issue (dismissal for want of prosecution) was the issue in The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that res judicata does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits".

22. Flowing from the above, a suit that was dismissed or struck out for non attendance or want of prosecution in my view cannot be said to be synonymous with a suit that has been heard and determined. In the circumstances of this case, I have looked at Eldoret HCCC No.14 of 1998 and it is clear that the interim orders that were earlier granted to the plaintiff herein were discharged after he failed to prosecute his application for temporary injunction. That is, the suit was dismissed for want of prosecution. The application was never heard and determined on merit.

23. For these reasons I find the Objection unmerited and I dismiss it.

24. Moving on to the crux of the application, the plaintiff seeks temporary injunction restraining the defendants from selling and or disposing off the suit property. That is, the suit before court was precipitated by the default and failure of the plaintiff to discharge his financial obligations upon which the 1st defendant sought to enforce the statutory power of sale as a means of recovering the debt owed to it.

25. A temporary injunction is a court order prohibiting an action by a party to a lawsuit until there has been a trial or other court action. Its purpose is to maintain the status quo and prevent irreparable damage or preserve the subject matter of the litigation until the trial is over

26. In Kenya, the law on granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the *Civil Procedure Rules* 2010 which provides: -

> "Where in any suit it is proved by affidavit or otherwise—

(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure cap. 21 [Subsidiary] C17 – 165;

(b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."

27. The conditions for consideration further in granting an injunction were well settled in the case of *Giella vs Cassman Brown & Company Limited* [1973] E A 358, where the court expressed itself on the condition that a party must satisfy for the court to grant an interlocutory injunction in the following terms: -

> " 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 injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

28. In *Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 others* [2016] eKLR the court while capturing the principles in Giella vs Cassman Brown observed that the questions to be asked are as follows:

    i. Is there a serious issue to be tried?

    ii. Will the applicant suffer irreparable harm if the injunction is not granted?

    iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience")

29. The test for granting of an interlocutory injunction was also considered in the *American Cyanamid Co. v Ethicom Limited* (1975) A AER 504 where three elements were noted to be of great importance namely:

    i. There must be a serious/fair issue to be tried,

    ii. Damages are not an adequate remedy,

    iii. The balance of convenience lies in favour of granting or refusing the application.

30. The circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the *Civil Procedure Rules* therefore require proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property. The court is in such situation enjoined to grant a temporary injunction to restrain such acts.

31. In the instant case, there is no doubt that the suit property is the subject of the loan in question. That is, the plaintiff admitted to having received a loan from the 1st defendant for a total of Kshs 1,500,000 and

in turn, charging the same to the suit property as security. It is also not in doubt that the said loan due has not been repaid pursuant to the loan agreement. This was admitted by the plaintiff himself in his supporting affidavit and supplementary affidavit. The only thing I note is that the plaintiff contends that the interest rate under the loan agreement has increased beyond expectation hence a violation of the loan agreement and the in duplum rule. This was however disputed by the bank which made reference to the loan agreement and submitted that the plaintiff is under obligation to discharge his side of the bargain under the said agreement.

32. Be as it may that defendant submitted that it would never recover the unpaid loan if the court proceeds to grant the plaintiff the orders sought. Likewise, the 1st defendant submitted that the injury that would result thereafter would be irreparable because the plaintiff has continually defaulted to make good the repayment as agreed within the terms set out in the agreement.

33. With those facts in mind, I am of the position that once it is conceded that the disputed loan amount and interests as prescribed in the mortgage contract/loan agreement remains unpaid, the court approach ought to be in consonant with the principles by *Digby's An Introduction to The History of the Law of Real Property* (1897) (5th) at page 285:

> " In the time of Littleton, a mortgage had become a species of estate upon condition. The land was conveyed, usually by feoffment, by the debtor to the creditor, subject to the condition that on repayment of the loan by a certain date by the feoffment (the debtor) might re-enter. On the failure to the feoffment to perform the condition, the law refused to regard the fact that the real nature of and intent of the transaction was that the land should be held by the feoffee merely as security for the debt, and insisted on the enforcing of the rules relating to estates upon condition in all their strictness, holding that the estate was thereupon vested absolutely in the feoffee. In later times, when the jurisdiction of the Chancellor was firmly established, the rights and duties of the mortgagor and mortgagee recognized by Equity became wholly different from those recognized by Law. .... In Equity, however, the real nature of the transaction is regarded, and even after default is made, notwithstanding the terms of the instrument creating the mortgage, the mortgagee will be made to reconvey the land to the mortgagor on payment of the debt, interest, and costs. The right which remains in the mortgagor is called his equity of redemption (right to redeem), and is in fact the ownership of land subject to the mortgage debt. (Emphasis added)"

34. That is to say, a party who fails to honor the terms of his or her agreement with a financial institution must be able to understand the consequences thereof. In other words, a party who takes a loan from a financial institution must be well aware that if he or she charges property as security to the loan, there is the risk that the property in question may be sold as an automatic right to the financial institution if that party fails to service/repay their debts as per the loan agreement.

35. It is noteworthy to mention that one of the key grievances by the plaintiff as highlighted above was on the interest rates imposed by the 1st defendant bank. However even in that area of concern, I am guided by the decision in *Mrao Ltd vs First American Bank of Kenya Ltd& 2 others* [2003] eKLR where the Court of Appeal had this to say: -

> " I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance

challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters. I agree entirely with the Commissioner of Assize Shah that the appellant was not entitled to an injunction upon any one of the grounds urged on its behalf."

36. The court of equity cannot therefore disregarded the intent of the two contracting parties unless there exist an allegation of misrepresentation, fraud or mistake in the transaction. The effect of the illegality is to prevent a party from receiving or benefiting under his own illegal act. There is no suggestion in the instant application that there was any element of fraud or illegality with the loan/charge agreement.

37. In terms of the instant application, it is important to note that the plaintiff borrowed the loan amount from the 1st defendant bank and on the basis of it offered the suit property as security. As a result, the redemption therefore of it is dependent upon evidence of settling the debt. In this regard, I take note of the decision of court in *Debenture Trust Corporation PLC vs Concord Trust* [2007] EWHC 1380 where the court said thus:

> " The essence of the equitable right to redeem is that the mortgagor is allowed to perform his contract, apart from time stipulations I do not consider that the court in the exercise of it is equitable jurisdiction, can or should rewrite the contractual terms of redemption in favour of the mortgagor. To do that would in effect allow the mortgagor to benefit from his own breach of contract."

38. Furthermore, in my view, the plaintiff in taking the loan from the 1st defendant conditionally transferred his proprietary rights in the suit property to the bank as the value of the loan advanced for his primary use. That is to say, that at the time that the plaintiff/applicant charged the property as security for loan, he was fully aware that the same would be sold without any further reference and or concurrence.

39. In this regard, I must reflect on the words of court in *Sambai Kitur v Standard Chartered Bank & 2 others,* Eldoret HCC No. 50 of 2002 where Emukule J held that: -

> " ....it must also be noted that when a chargor lets lose its property to a charge as security for a loan or nay other commercial facility on the basis that in the event of default it be sold by a charge, the damages are foreseeable. The security is henceforth a commodity for sale or possible sale without prior concurrence and consent of the chargor. How can he, having defaulted to pay loan arrears prompting a charge to exercise its statutory power of sale claim that he is likely to suffer loss and injury incapable of compensation of damages? Such an argument is definitely misplaced and has no merit. It is immaterial that the property is a family residence, a fact well known to the chargor at the time of offering it as security to the charge." Emphasis Added.

40. Furthermore, I fully associate myself with the maxim of equity that he who comes to equity must come with clean hands. From the evidence on record, it is clear that the plaintiff despite various communication from the bank to honor his obligation failed to respond to the same and only rushed to this court once he noticed that the bank was serious in exercising its statutory power of sale. In addition, despite making promises to the bank that he would pay his loan, he has not tendered any evidence to suggest that he has honored his own promises to the bank. Quite the contrary, the plaintiff has failed to honor his debt repayment plans.

41. Finally, guided by previous conduct, I am pessimistic that the plaintiff would pursue his case once the orders sought are granted. As clearly demonstrated by his behaviour in 1998, once he got the interim

orders, he failed to prosecute the substantive application and suit resulting in the discharge of the same. I have also not seen any commitment through evidence that the plaintiff is determined to repay his debt to the 1st defendant which he acknowledges is long overdue.

42. In the circumstances and for the foregoing reasons, I am afraid that the plaintiff has not met the threshold for the grant of the orders sought and I hereby dismiss the application dated the 25th of November 2021 with costs.

DATED, SIGNED AND DELIVERED THIS 27TH OF JUNE 2022.

E. K. OGOLA

JUDGE