



**Ogwedhi Properties Limited & another v Ollerai Investments Limited & 3 others
(Civil Suit 20 of 2021) [2022] KEHC 12662 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12662 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL SUIT 20 OF 2021**

**JN KAMAU, J
JULY 28, 2022**

BETWEEN

OGWEDHI PROPERTIES LIMITED 1ST PLAINTIFF

KISUMU PARKVIEW RESORTS LIMITED 2ND PLAINTIFF

AND

OLLERAI INVESTMENTS LIMITED 1ST DEFENDANT

OLTEPESI PROPERTIES LIMITED 2ND DEFENDANT

IMTIAZ KHAN 3RD DEFENDANT

PRINCIPAL AUCTIONEERS 4TH DEFENDANT

RULING

Introduction

1. In their Chamber Summons application dated and filed November 22, 2021, the Plaintiffs herein sought for orders that pending the hearing and determination of the disputes herein by an arbitral tribunal, the court be pleased to issue interim measures of protection in the form of an injunction restraining the Defendants from interfering with the management and operations of Kisumu Parkview Resorts and from auctioning, selling off or in any way disposing the subject hereof, Title No Kisumu Municipality/Block 12/182 located at Milimani Estate, Kisumu (hereinafter referred to as “the subject property”).
2. The said application was supported by the Affidavit of Charles Ogada, a Director of the 1st and 2nd Plaintiffs that was sworn on November 22, 2022. They averred that the 2nd Plaintiff built a commercial hotel known as Vittoria Suites Hotel that was completed in 2013.



3. They contended that on or about early 2012, the 2nd Defendant indicated to the 2nd Plaintiff that it was in a position to mobilise resources to support the development and progression of the business. In consideration, the 2nd Defendant was to be granted co-beneficial interest in the business. The 2nd Defendant was to have an interest in the form of a co-owner of an investment vehicle to which the property would be held. The period was to be for a period of seven (7) years. The 1st Plaintiff was to retain its beneficial interest which would revert back to it after seven (7) years when the Joint Venture came to an end unless extended by Agreement of the parties. They registered a Special Purpose Vehicle by the name Ogwedhi Properties Limited, the 1st Plaintiff herein and signed a Joint Venture Agreement on April 3, 2012.
4. They stated that through their participation in the 1st Plaintiff's boardroom activities as directors and shareholders, the 2nd and 3rd Defendants represented to them that they were in a position to assist it secure affordable financial resources, technical expertise and other resources to pay off an existing credit facility owed by the business and to make it more profitable and accordingly, brought in the 1st Defendant as an independent financier for the said purpose, in 2016.
5. They pointed out that the 1st Defendant was granted a floating charge and a charge over the subject property in consideration of it offering financial facility of about Kshs 154 million to the 1st Plaintiff. They averred that the 1st Plaintiff then entered into a loan agreement with the 1st Defendant based on the said understanding and representation by the 1st, 2nd and 3rd Defendants.
6. It was their contention that the obligation to repay the said loan was on the 2nd Plaintiff and the 2nd Defendant as shareholders in the 1st Plaintiff which would be borne equally out of their share of the profits of the business or from their contributions under the Joint Venture Agreement.
7. It was their contention that after 2012, the 3rd Defendant acquired a controlling stake and ownership of the 2nd Defendant and the Alliance Capital Partners and consequently became the decision maker on behalf of the 2nd Defendant and by extension the 2nd Defendant's voice at its dealings with the Plaintiffs.
8. They asserted that they learnt that the 3rd Defendant was the controller and the beneficial owner of the 1st and 2nd Defendants which he did not disclose the same creating a conflict of interest in the manner in which the business was handled.
9. They added that his machinations through the 2nd Defendant's frustrations of boardroom activities of the 1st Plaintiff proved potent and disruptive to the entire business with their actions and inactions aimed at frustrating their business with a view to denying them the opportunity to realise value out of the subject property and business.
10. They further stated that the 1st, 2nd and 3rd Defendants' aim was to gradually bait the 2nd Plaintiff to give up its ownership of the subject property with the sole aim of eventually disentitling it of its proprietary rights in the said property.
11. They added that following the said frustrations of the Plaintiffs' business orchestrated by the Defendants, the 1st Defendant purportedly issued a defective and illegal statutory notice with a view to selling the subject property and deny them a reasonable opportunity to redeem it. They also stated that the 4th Defendant also purportedly issued notices indicating that the subject property was due for sale by auction.
12. They pointed out that disputes had arisen between the parties regarding their obligations under the Joint Venture Agreement between the 2nd Plaintiff and the 2nd Defendant and the Loan Agreement between the 1st Plaintiff and the 1st Defendant which both contained arbitration agreements and



- being aggrieved, they intended to commence arbitration proceedings against the Defendants for misrepresentation, breaches of contract, false inducement and fraud necessitating the subject contracts to be preserved to save the envisaged arbitration proceedings from being an academic exercise.
13. In opposition to the said application, the 1st and 2nd Defendant purportedly filed Grounds of Opposition dated December 3, 2021 and a Replying Affidavit that was sworn by the 3rd Defendant herein. The Registry notified this court the said documents had not been paid for despite having been assessed and the invoice emailed to the Advocate. For that reason, this court found the same not to have been properly filed and did not therefore consider the contents therein.
 14. On December 7, 2021, the 3rd Defendant filed a Replying Affidavit that he swore on December 6, 2021. He denied ever having been a director of the 1st Plaintiff and averred that the auction of the subject property only arose after the 1st Defendant's sought to realise the aforementioned charge.
 15. He also denied being a party to the Charge or guilty of the Plaintiffs' allegations of fraud, misrepresentation, breaches of contract and false inducement which he termed as baseless. He averred that he approached the court with clean hands and urged this court not to exercise its discretion in their favour but instead dismiss their application with costs.
 16. The Appellant's Written Submissions were dated February 28, 2022. The 1st, 2nd and 4th Defendant's Written Submissions were dated January 28, 2022 and filed on March 3, 2022 while those of the 3rd Defendant were dated January 28, 2022 and filed on February 1, 2022.
 17. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

18. Having analysed the affidavit evidence and the respective parties' Written Submissions, this court determined the various issues raised in the following distinct heads.

I. Res Judicata

19. The Plaintiffs submitted that the Defendants had struggled to connect the relationship between the present proceedings and the decision in *Moses Agumba & Another vs Ogwedhi Properties Limited & Another* [2020] eKLR by claiming that this case was *res judicata*. They asserted that the said suit was instituted by two (2) plaintiffs, Moses Agumba and Bernard Onyango Omoro who were not party to the two (2) Agreements, against the 1st Plaintiff and the 1st Defendant herein while the present dispute related to questions of fraud, deceit and breaches of parent contracts regarding loan obligations between a developer and financier.
20. They pointed out that the law recognises that a company exists as a separate legal entity from its shareholders and directors and that it had not been shown that the two (2) directors had filed the suit on behalf of the current plaintiffs and in any case, such assertion would be illogical given that in that other suit the current plaintiffs were actually considered defendants and rights were enforced against them.
21. They placed reliance on the case of *Kolden Holdings Ltd vs Rodette Commerce Ltd & Another* [2007] EWHC 1597 (Comm) where the court held that two (2) separate legal entities might have a sufficient degree of identity in their interests in the subject matter of the two (2) disputes so that they could be regarded as one and the same party but that the test was whether the interests of the two (2) legal entities involved were identical to and in dissociable from one another in relation to the subject matter of the two (2) disputes.



22. They were emphatic that a question of *res judicata* was a defense that should be raised at the appropriate time, in response to substantive proceedings before the arbitral tribunal.
23. On their part, the 1st, 2nd and 4th Defendants submitted that the Plaintiffs' application herein was *res judicata* as against the case *Moses Agumba & Another vs Ogwedhi Properties Limited & Another* [2020] eKLR in respect of a Notice of Motion dated May 7, 2019 which was dismissed by the Ruling dated January 28, 2020.
24. They submitted that once a judicial decision is rendered, it ought to be accepted as final and that there had to be an end to litigation, save for rights of appeal and challenge to their legality as was held in the case of *Bernard Mugo Ndegwa vs James Nderitu Githae & 2 others* [2010] eKLR.
25. They placed reliance on the case of *Bernard Mugo Ndegwa vs James Nderitu Githae & 2 others* (*Supra*) where the court laid out the test in determining whether a matter was *res judicata* as being that the suit or issue was directly and substantially in issue in a former suit, the former suit was between same parties or parties under whom they or any of them claim, the parties were litigating under the same title and the issue in the former suit was heard and finally determine.
26. It was their contention that the application herein met all the tenets and was out rightly *res judicata* for the reasons that the issues were the same, the parties were the same in that Moses Agumba and Bernard Omoro were also directors of the 2nd Plaintiff herein and that they had litigated under the same title and a final determination delivered by this court on February 28, 2020, which decision had not been appealed and/or reviewed.
27. They placed reliance on the case of *Satya Bhama Gandhi vs Director of Public Prosecutions 7 3 Others* [2018] eKLR where the court held that a multiplicity of actions on the same matter between the same parties is an abuse of court process and demonstrates an intention to harass, irritate and annoy the adversary. It was their submission that this court therefore lacked jurisdiction on that ground alone, and ought to down its tools as was held in the case of *Motor Vessel Lillian SS vs Caltex Oil (Kenya) Ltd* [1989] KLR 1.
28. The 3rd Respondent's Written Submissions focused on him not having been a party to the arbitration proceedings. He also denied the Plaintiffs' allegations against him. He argued that the Plaintiffs had not demonstrated sufficient grounds to be granted an interim measure of protection and that a charge cannot be restrained from exercising its statutory power of sale when the same had arisen.
29. The law pertaining to the doctrine of *res judicata* is captured under the provisions of Section 7 of the *Civil Procedure Act* Cap 21 (Laws of Kenya) which states that:-

“No court shall try any suit 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 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 (emphasis court).”
30. In the case of *ET vs Attorney General & Another* [2012] eKLR, the court stated that courts must be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy. It further held that the test was whether the plaintiff in the second suit was trying to bring in another way, a new cause of action which had been resolved by a court of competent jurisdiction.



31. It was clear from the parties' submissions that they were in agreement as to when the doctrine of *res judicata* could be raised and its effect on proceedings once the same was established to exist at any given time.
32. From the pleadings and submissions, it was not in dispute that the subject matter in the previous litigation and the current application were the same. Both the former suits and the present suit were between the same subject property and the same parties, save for the fact that in the former suit, the Plaintiffs were purchasers who were directors of the 2nd Plaintiff herein. This was well captured in the Ruling by Cherere J that was delivered on January 28, 2020. Having said so, the pertinent question that was before this court was whether the 1st, 2nd and 4th Defendants had established that the Plaintiffs' application was *res judicata*.
33. A reading of the said Ruling showed that the plaintiffs therein were both directors of the 2nd Plaintiff herein and they had sought an order restraining the 1st Plaintiff and the 1st Defendant herein from selling or otherwise disposing of the suit property which is the same subject property in the proceedings herein.
34. At Paragraphs (45) of her Ruling, Cherere J rendered herself as follows:-

“And for the reason that the registered right of the 2nd Defendant/Respondent ranks in priority to the rights of the Plaintiffs/Applicants, I am persuaded that the balance of convenience tilts in favour of not granting an order to restrain the 2nd Defendant/Respondent from exercising its right under the charge to realize the suit property.” (emphasis court)
35. The doctrine of *res judicata* principle was meant to lock out from the court system parties who had had their day in courts of competent jurisdiction from re-litigating the same issues against the same opponents. Without it, there would be no end to litigation and the judicial process would be rendered a nuisance and brought to disrepute. The foundation of *res judicata* thus rests in the public interest for swift, sure and certain justice.
36. Although the parties in *Moses Agumba & Another vs Ogwedhi Properties Limited & Another (Supra)* were not between the same parties or between parties under whom they or any of them claimed or they were not litigating under same title, the suit in which a similar issue had been subsequently raised had been heard and finally decided by a competent court as was envisaged in Section 7 of the [Civil Procedure Act](#).
37. As the issue in question herein related to the subject property which was the subject matter in the aforesaid Ruling of Cherere J, having applied the law to the facts before it, this court was persuaded to find that that the 1st, 2nd and 4th Defendants had ably demonstrated that the proceedings herein were *res judicata*.
38. This court would have downed its tools at this stage. However, it found it prudent to address the question as to whether or not it could have granted interim measures of protection in the nature of an injunction as the Plaintiffs herein had prayed for.

II. Interim Measures of Protection

39. This court noted that detailed Written Submissions by the parties on several issues and noted that the question of whether or not there was dispute between the parties or whether or not all the parties herein could be made parties in the arbitration proceedings were issues that were within the purview



of the arbitral tribunal. This court thus restrained itself from pronouncing itself of the said issues the parties had raised and limited itself to the question as to whether in the circumstances of this case it could grant the interim measures in the nature of an injunction as the Plaintiffs had sought.

40. The court has power to strike out parties from a suit on its own motion by reason of misjoinder as provided in Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 and direct orders to only those parties are relevant to the proceeding before it. This court could therefore have issued interim measures in favour and against the pertinent parties.

41. Notably, Order 1 Rule 10(2) of the [Civil Procedure Rules](#) provide as follows:-

“The court may at any stage of the proceedings, either upon or without the application of either party (emphasis court), and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

42. It is important to point out that the fact that there were two (2) different agreements that had arbitration agreements or that there was misjoinder of parties herein and/or that there were parties in these proceedings who were not parties to the arbitration agreements would not have been a sufficient ground for this court not to have granted interim measures of protection, if the same were indeed merited.

43. To this end, this court perused the Joint Venture and Shareholding Agreement which showed that the same was between the Plaintiffs and the 2nd Defendant herein while the Loan Note Instrument was between the 1st Plaintiff and the 1st Defendant. They both had valid arbitration agreements within the meaning of Section 3 of the [Arbitration Act](#) No 4 of 1995.

44. Section 3 of the [Arbitration Act](#) states that an arbitration agreement:-

“means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”

45. The power to issue interim measures of protection can be found in Section 7(1) and (2) of the [Arbitration Act](#) which provides as follows:-

“It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.”

46. Having said so, whereas this court found and held that parties had valid arbitration agreements and that the High Court had power to grant interim measures of protection in the nature of an injunction as provided in 7(1) and (2) of the [Arbitration Act](#), its hands were tied for the reason that a court of equal and competent jurisdiction had already pronounced itself on the issue by the rights of the 1st



Defendant herein who was the 2nd Defendant in *Moses Agumba & Another vs Ogwedhi Properties Limited & Another*(*Supra*) by declaring that they ranked in priority to other interests as far as the subject property was concerned.

47. Indeed, there was a risk of two (2) courts of equal and competent jurisdiction granting contradictory orders. The purport of the Ruling of Cherere J was that the subject property could be sold by the 1st Defendant in exercise of its statutory power of sale. On the other hand, if this court were to grant the interim measures in the form of an injunction in respect of the same subject property, it would mean that the 1st Defendant would not be able to exercise its statutory power of sale.
48. As determination was made by a court of equal and competent jurisdiction, this court could not sit on appeal of that court. The only option that the Plaintiffs had, if at all they were aggrieved by the decision of Cherere J was to seek recourse at the Court of Appeal to have the said Ruling set aside so as to free the subject property for further litigation by the parties in the High Court under Section 7 of the *Arbitration Act*.
49. For that reason, this court was not able to interrogate whether or not the Plaintiffs had satisfied the conditions for the granting of an order of injunction as was set out in the case of *Giella vs Cassman Brown* [1973] EA 358 which were that for an applicant to be granted an order of interlocutory injunction, it had to demonstrate that it had established a prima facie case, that damages would not be adequate compensation if the interlocutory injunction was not granted and that if in doubt, the court would grant an interlocutory injunction on a balance of convenience.

Disposition

50. For the foregoing reasons, the upshot of this court's decision was that the Plaintiffs' Chambers Summons application dated and filed on November 22, 2021 was not merited and the same be and is hereby dismissed. The Plaintiffs will bear the Defendants' costs of the application.
51. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF JULY 2022

J. KAMAU

JUDGE

