



**Vikrut Prerequisites Ltd v Hfc Limited & another (Civil Case 10 of 2017)
[2022] KEHC 12449 (KLR) (Admiralty) (12 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12449 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
ADMIRALTY
CIVIL CASE 10 OF 2017
A MSHILA, J
AUGUST 12, 2022**

BETWEEN

VIKRUT PREREQUISITES LTD APPLICANT

AND

HFC LIMITED 1ST RESPONDENT

HF FOUNDATION LTD 2ND RESPONDENT

RULING

Background

1. The applicant filed notice of motion dated February 6, 2020 under article 22, 23, 40, 50 & 165(3) of the Constitution 2020; sections 90, 99(1)(b) & (3), 104,105,106 of the Land Act; sections 1, 1A, 1B, 3, 3A and 80 of the Civil Procedure Act 2010; section 120 of the Evidence Act and order 22 rules 61(3) 69, 70(1), 71, 75, 77(1) and order 51 rule 1, order 8 rule 3, order 1 rule 10(2) and (4) of the Civil Procedure Rules, 2010 and all enabling provisions of law); The application was supported by the sworn affidavit of Francis Victor Karua Gathii and the applicant sought for the following orders;
 - a. Spent.
 - b. Pending the hearing and determination of this application the defendant/respondents jointly and severally whether by themselves, their servants and/or agents be restrained by an order of temporary injunction from dealing, interfering, transferring, wasting, constructing on, interfering with, alienating or otherwise disposing land parcel No land reference number 209/9958 (IR 38495); or pending hearing and determination of this suit.



- c. Pending the hearing and determination of this application a prohibitory order be granted prohibiting the Government Lands Registrar from transferring land reference number 209/9958 (IR 38495) to the 3rd defendant; or pending hearing and determination of this suit.
 - d. A declaratory order be issued declaring that the sale by Public Auction of land reference number 209/9958 (IR 38495) on the July 23, 2019 by the 4th defendant on behalf of the 1st and 2nd respondent to the 3rd defendant has abated and is a nullity *ab initio* and it be set aside.
 - e. Leave be granted to the applicant to amend the plaint dated January 10, 2017 out of time to enjoin Mwangi Kariuki t/a Namasaka & Kariuki Advocates (3rd defendant) and Garam Investments (4th defendant) as parties to the suit.
 - f. Any other order deemed fit for the administration of justice and proper disposition of this suit.
2. The parties were directed to canvass the application by filing and exchanging written submissions. Hereunder are the parties rival submissions;

Applicant's Case

3. The applicant submitted that the purported sale by auction on July 23, 2019 was a sham/scam. The process of sale was tainted with fraud and misrepresentation of Facts. The respondent not only had notice of the impropriety but is an accessory to the entire scam. The 3rd defendant/respondent herein was merely used as a conduit illegally process and transfer/register the suit property into the chargee/bank's name. The 3rd defendant/respondent is thus a conduit/accessory in a fraudulent act/process. Accordingly, the 3rd respondent (ie alleged purchaser) does not enjoy protection under section 99 of the *Land Act*.
4. On the issue of *res judicata*, the applicant submitted that *res judicata* as provided under the said section 7 of the *Civil Procedure Act* is inapplicable since this matter has never been heard and or determined in any other court over the same subject matter and as between the same parties. No ruling/order and/or judgment/decree from any court has been produced to demonstrate such.
5. It was the applicant's argument that at the onset of this matter the plaintiff/applicant was represented by the firm of KN Mburu Associates who filed the plaint dated January 10, 2017 alongside the application dated January 10, 2017 seeking protective orders of injunction as an equitable remedy pending the hearing and determination of this suit. For one reason or another, a number of very important issues were not brought to the attention of the court before the Hon Lady Justice G Nzioka who was the trial judge at the time. At that point, the court was made to believe that the relationship between the 1st and 2nd defendant on one hand and that of the plaintiff was purely that of a lender/chargee and borrower/chargor as such, no injunctive orders were issued.
6. The current application brought before the court is completely new/fresh in its very nature and the issues are completely distinct from those raised on January 10, 2017. The prayers may be similar but the facts and the circumstances leading up to this application as completely different but interrelated.
7. New and crucial information/documentation has been produced in the supporting affidavit and further affidavit of Francis Victor Karua Gathii indicating that the relationship between the plaintiff and the 1st and 2nd defendants was not that of a lender - borrower but a partnership to which the 1st and 2nd defendants were in breach. The plaintiff acted on the promises made by the 1st and 2nd defendants as well as their conduct (ie doctrine of estoppel is applicable as deponed in the supporting affidavit dated February 6, 2020 and succinctly espoused under annexure VPL-7) therein to their detriment.



8. It was the applicant's submission that an unlawful process, tainted with fraud, misrepresentation, dishonest conduct and breach of contractual obligation with the malicious aim of drawing the plaintiff into debt in order to dispossess him of his hard earned property cannot confer a good and valid title worth of protection as envisaged under section 99 of the Land Act 2012. The respondents are expressly precluded by section 99(3) of the Land Act from being afforded any protection.
9. On whether the plaintiff's application herein meets the test for review as set out under order 45 rule I(l)(a) & (b) of the Civil Procedure Rules; the applicant submitted that the test for review has been met and urged the court to exercise its inherent powers to look into the issues raised and be pleased to grant the interlocutory orders sought. Order 45 rule 2(2) permits the court to sit and determine the issues raised in the absence of the Hon Lady Justice Grace Nzioka who has since been transferred to another Division.
10. Further, the applicant submitted that it had demonstrated a good *prima facie* case with high probability of success. The grounds raised herein above under paragraphs (a) to (l) demonstrate the fact that the plaintiff/applicant has a good case against the defendant/respondents. What it seeks is to be protected and have *status quo* maintained pending the hearing and determination of the suit.
11. The applicant presented new/more evidence and/or information that meets the test set in the case of Giella v Casman Brown & Company Ltd (1973) EA 385 to warrant the intervention of the court in granting the protective orders (ie equitable remedies) sought in the interim. In this regard, the applicant submitted that it has discharged its duty on a balance of probabilities and is indeed deserving of the protective orders sought.

Respondents' Case

12. The 1st and 2nd respondent raised a preliminary objection dated the March 2, 2020 and submitted that the application is *res judicata* and offends the provisions of section 7 of the Civil Procedure Act. The respondents urged the court to strike out the application as it was grossly incompetent and was a blatant abuse of the court process.
13. The respondents submitted that the application dated January 10, 2017 was premised on allegations of the plaintiff/applicant's relationship with the 1st and 2nd defendant/respondents, allegations that the 1st defendant/respondent had no legal capacity to offer the financial facilities offered herein, allegations of breach of the *in duplum* rule by the 1st defendant/respondent, alleged conspiracy between the defendant/respondents to defraud the plaintiff/applicant of its property. By a ruling delivered on July 11, 2018, Lady Justice GN Nzioka directed the parties to file terms they deemed appropriate upon which the court was to order stay of the sale of the suit property and in default of which the court was to determine the same based on the evidence on the record. The plaintiff/applicant failed to file the said terms as a result of which the aforesaid injunction application was dismissed.
14. In the present application, the plaintiff/applicant is seeking inter alia injunctive order against the defendant/applicants restraining them from dealing, transferring, wasting, constructing or interfering with land parcel No LR No 209/9958 (IR 38495). To the extent that the said prayer was the subject of the plaintiff/applicant's injunction application that was dismissed as aforesaid, the plaintiff/applicant's application is clearly *res judicata* and fit for dismissal with costs. The respondents relied on the case of Kenya Commercial Bank Limited v Benjob Amalgamated Limited [2017] eKLR.
15. In addition, further, in paragraph 13 of the supporting affidavit of Francis Karua Gathii sworn on February 6, 2020, the plaintiff has admitted that it filed CMCC No 8895 of 2017 (Vikrut Prerequisites Ltd v Housing Finance Ltd & Leakeys Auctioneers) and obtained interim orders of injunction



restraining the defendant/respondents from in any way executing the alleged recovery process against the plaintiff/applicant therein by way of a sale of its immovable property known as LR No 209/9958 (IR No 384959). If the said allegation is factual, which at any rate it is denied, the prayers for injunction are admittedly superfluous as there are already injunction orders in pace against the defendant/respondents issued by the subordinate court. The admission is also clear evidence of the plaintiff/applicants abuse of the court process.

16. Further to the above, the applicant admitted in paragraphs 19, 20, 21, 22, 23 and 26 of the supporting affidavit of Francis Karua Gathii sworn on July 16, 2021 that the suit property herein was sold at a public auction that the plaintiff/applicant is contesting in the present application.
17. The copy of title annexure "CW 3" and the memorandum of sale annexure "CW 2" of the replying affidavit of Christine Wahome as well as that annexure "FVK 1" in the further affidavit of Francis Karua Gathii sworn on July 16, 2021 also shows that the suit property was transferred to a third party.
18. The plaintiff/applicant prayed for inter alia injunctive orders against the defendant/respondents restraining them from dealing, transferring, wasting, constructing or interfering with land parcel No LR No 209/9958 (IR 38495). The Court of Appeal in *Harishchandra Bhovanbhai Tobanputra & another v Paramount Universal Bank Limited & 3 others* [2019] eKLR, citing with approval the rendition of the said court in *Mbutia v Timba Credit Finance Corporation and another* [1986-1989] 1 EA 340 had the following to say in respect of the scope of the equity of redemption;

“A sale destroys the equity of redemption in the mortgaged property and constitutes the mortgagees exercising the power of sale as a trustee of the surplus proceeds of sale, if any, for the person interested according to priorities.”
19. Further, section 99 (4) of the *Land Act* provides as follows:

“A person, prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.”
20. It was the respondents’ position that the orders of prohibition on registration of the transfer of the suit property sought in the present application have been overtaken by events as the suit property is now registered in the names of third parties who are not present in court. The same cannot issue. (See: *Mwenda Maka v Péter M Kiiti & another* [2004] eKLR). In any event, as the orders have been sought against the Government Lands Registrar, a non-party to the present proceedings, the same cannot be granted- It is trite law that orders cannot be granted against parties who are not part of the proceedings.
21. The orders sought are final in nature, the same cannot be granted at an interlocutory stage without verification of the underlying averments and allegations at the full trial of this matter. The various allegations of fraud, collusion, unprofessionalism, vested interest and intention to sell the suit property herein are contested matters that cannot be determined primarily through affidavit evidence. The veracity of these allegations can only be determined at full trial.
22. Lastly, in relation to the prayers for amendment of the plaint to include the 3rd and 4th defendants, it has been averred through affidavit evidence of Christine Wahome sworn on November 2, 2021 that the said intended defendants are agents of the purchaser of the suit property. This has not been controverted by the plaintiff/applicant. It is trite law that facts deponed on oath are deemed admitted. The principal of the said defendant/respondents has also been disclosed being the purchaser of the suit property herein.
23. The application should be dismissed with costs.



Issues for Determination

24. After considering the application, the responses therewith and the written submissions by the parties the court has framed the following issues for determination;
- a. Whether the application is *res judicata*; Whether the Preliminary objection has merit?
 - b. Whether the applicant should be granted leave to amend its plaint?
 - c. Whether order 22 rule 61(3) of the Civil Procedure Code is applicable at this stage?

Analysis

Whether the Application is *res judicata*; whether the Preliminary Objection has merit?

25. The doctrine of *res judicata* is set out in the [Civil Procedure Act](#) at section 7 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.”

26. 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.

Explanation. (4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

27. In summary, *res judicata* will successfully be raised as a preliminary objection 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.



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

“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.’

29. 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.”

30. It was the respondent’s position that the instant application is *res judicata* because the issues raised herein were raised by the applicant in the application dated July 17, 2013; The issues raised in the application dated July 17, 2013 were as follows;

- i. That an order for injunction be issued restraining the defendant from intermeddling with the suit property either by selling, advertising for sale and or alienating and or disposing off, selling by public auction or completing any conveyance or transfer or any sale of land known as LR No 2/61 situated in Kilimani along Kirichwa road.
- ii. That an order to be issued restraining the defendant from foreclosing on the suit property by relying on the statutory notice dated April 4, 2013 and/or any notices allegedly served upon the plaintiff.
- iii. That an order be made extending the period of time for compliance by the chargor with the statutory notice served by the respondent and dated April 4, 2013, under section 90 of the *Land Act* 2012.
- iv. That the court in the alternative substitutes a different remedy for the one applied for or proposed by the respondent, with a more suitable remedy like appointment of a receiver in view of the prevailing circumstances and in line with section 140 (2) (c) of the *Land Act* 2012.

31. The court delivered a ruling on the issues on March 13, 2014.



32. On the face of it in this instant application the applicant seeks a review under the provisions of section 80 of the *Civil Procedure Act* of the injunctive orders granted by Hon Lady Justice Grace Nzioka and seeks to include the 3rd and 4th defendant; in its ruling dated January 25, 2020 the court granted the applicant a conditional injunctive relief subject to the payment of the sum of Kshs 2.5 million to the respondents within fourteen (14) days; The applicant failed to comply and thereafter filed another application seeking a review and enlargement of time of time for compliance which application was also disallowed. The court also pointed out that the 3rd and 4th defendants were yet to be enjoined and that injunctive orders are only issuable against parties to the suit.
33. The applicant in the instant application contends that the application is different as the 3rd and 4th respondents are now parties to suit. This is indeed a strange submission as one of the prayers sought is to amend the plaint so as to enjoin the 3rd and 4th defendant which would mean that these two parties are yet to be enjoined. These same parties also have a pending application for joinder which is awaiting directions on its hearing and determination. This therefore renders the instant application seeking injunctive relief and the former disposed application as still being as between the same parties litigating under the same title. The applicant is therefore estopped from prosecuting the instant application because it is *res judicata*.
34. This court also has notice of the existence of a similar suit filed by the applicant against the same respondents in the subordinate court, that is CMCC 8895 of 2017 which suit is yet to be withdrawn, heard and or determined. Also noted is that on the January 25, 2017 the applicant secured injunctive orders against the respondents from this lower court but failed to comply with the said orders.
35. The issues dealt with then and now are found to be directly and substantially related and the issues relate to injunctive orders which were heard and granted in both the High Court and subordinate court. This court reiterates that the subject matter is the same and the parties are litigating under the same title. The competency of the lower court may be in dispute but the subsequent court in which the same issue was raised was competent and the court heard and rendered a determination on the issue.
36. The upshot is that this court is satisfied that the instant Application fits the criteria of *res judicata*.

Whether the Applicant should be granted leave to amend its Plaint?

37. This court will not belabor itself at this stage in addressing the issue of amendment of the plaint as there is no draft amended plaint annexed to this application for the court to peruse and make a determination. Nevertheless, this issue can be revisited with the application for joinder by the intended 3rd and 4th interested parties.

Whether Order 22 Rule 61(3) of the Civil Procedure Code is applicable at this stage?

38. The applicant sought for prayers under the provisions of order 22 rule 61(3) of the Civil Procedure Rules. Order 22 relates to execution of decrees and orders and just by a cursory reading of this rule it indicates and makes reference to a holder of a decree in execution of which property is to be sold; in such instances a decree-holder is estopped from bidding or buying such property without leave of the court. This suit is yet to be heard and determined and therefore no decree of the court is available for execution. It is therefore this courts considered view that at this stage such a prayer is not only improper but also premature.

Findings and Determination

39. For the foregoing reasons this court makes the following findings and determinations;



- i. This court finds that the preliminary objection has merit and it is upheld. The application is found to have all the elements of *res judicata* and is found to be incompetent;
- ii. The only order that commends itself to this court is to strike out the application with costs;
- iii. The applicant shall bear the costs;
- iv. Mention on August 24, 2022 before the Deputy Registrar for case management.

Orders accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 12TH DAY OF AUGUST, 2022.

HON. A. MSHILA

JUDGE

In the presence of;

Mumo for Olando for the plaintiff/applicant

Mutonyi holding brief for Wafula for the 1st and 2nd defendants/respondents

Lucy -----court assistant

