



Kumari (Suing as Personal Representative of the Estate of Prieya Gandhi (Deceased) & another v Development Bank of Kenya Ltd & 2 others (Civil Case 422 of 2016) [2022] KEHC 14124 (KLR) (Commercial and Tax) (21 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14124 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 422 OF 2016
A MSHILA, J
OCTOBER 21, 2022**

BETWEEN

**RAJ KUMARI (SUING AS PERSONAL REPRESENTATIVE OF THE ESATE OF
PRIEYA GANDHI (DECEASED) 1ST PLAINTIFF**

RAJ KUMARI GANDHI 2ND PLAINTIFF

AND

DEVELOPMENT BANK OF KENYA LTD 1ST DEFENDANT

INTEGRA AUCTIONEERING (K) COMPANY LIMITED 2ND DEFENDANT

GARAM INVESTMENTS AUCTIONEERS 3RD DEFENDANT

RULING

1. The plaintiff/applicants filed a motion dated April 9, 2018 brought under order 40 rule 2 of the [Civil Procedure Rules](#), Sections 1A, 1B and 3A of the [Civil Procedure Act](#) for orders;
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of the main suit herein, this honourable court be pleased to issue an order of injunction restraining the defendants, their agents, officers, servants, workmen, employees and/or any other person from acting or purporting to act for and on their behalf from disposing or in any way dealing with property LR Number 3734/96
 - d. That the 1st defendant forthwith discharge the charge over title number Nairobi/Block32/324 and release the original title thereto to the 2nd applicant herein



- e. That costs of the application be awarded to the plaintiff/applicants.
2. The application was based on the grounds on the face of it and on the supporting affidavit and further supporting affidavit of Raj Kumari Gandhi. In it he stated that the scheduled auction is purported to be based upon a notice dated March 23, 2018 addressed to the registered owner of the property herein Prieya Gandhi who was already deceased as at the date of the purported notice and the 1st defendant who is purported to have instructed the 3rd respondent herein was at all times aware that Prieya Gandhi was deceased. There was therefore no proper service and an auction can proceed on the basis of such defective service.
3. The application was opposed by the replying affidavit of Olga Lela Sechero dated June 8, 2018. In it he claims that the applicants are vexatious litigants having brought 4 previous applications on similar grounds seeking orders for injunction in the suit to block the auction of the suit properties.

Applicants Case

4. It is the applicant's case that the 3rd respondents issued through registered post a notice to Prieya Gandhi (deceased) informing her of their intention to sell her property LR No 3734/96 on the March 23, 2018. The said notice was addressed to Prieya Gandhi in total disregard of the fact that she was already deceased at the date of the notice. The 3rd respondent being aware of the death but went ahead to effect service through registered post. The post office requires that for one to collect a letter delivered by registered post the addressee must show up at the post office with their Identity Card and this was impossible in this case.
5. The said notice dated March 23, 2018 was issued pursuant to earlier notices by the 1st defendant as well as notices issued by the 2nd defendant. The redemption notices and notification of sale issued by Integra Auctioneers are fatally defective for failing to comply with the mandatory provisions of the [Auctioneers Act](#) for the following reasons;
 - a. The purported 45-day redemption notice and the accompanying notification of sale do not indicate the value of the property in breach of the mandatory provisions of rule 15 (b) of the [Auctioneer Rules](#).
 - b. The purported 45- day redemption notice and the accompanying notification of sale do not indicate the proper amount being demanded which in this case should be Kshs 22,218,751.91 in breach of the mandatory provisions of Rule 15(d) of the [Auctioneer Rules](#).
6. The 3rd respondent cannot rely on the said 45-day redemption notice and notification for sale, issued by a different auctioneer one and a half years ago to auction the 1st applicants property LR No 3734/96 as scheduled for the following reasons;-
 - a. The form of notification for sale set out under the auctioneer rule requires that the personal name of the auctioneer as well as his trading name, address, telephone contacts of the auctioneer as well as the date of the letter of instruction to the auctioneer instructed to undertake the sale be set out in every notification of sale
 - b. In breach of that requirement, the purported notice of March 28, 2018 other than indicating the trading name of the auctioneer does not indicate the individual name of the auctioneer was instructed.
 - c. As such in order to comply with the required form of notification of sale where there is a change of auctioneer after a previous auctioneer had issued a notification of sale, the new auctioneer



must issue a fresh notification for sale, setting out his/her name as well as the name he trades under physical and postal address together with his/her telephone number as well as the date of the letter of instruction instructing such auctioneer in the place of the outgoing auctioneer and serve the same upon the charge.

7. The applicants argued further that the 3rd respondent in this case has not served upon the personal representative of the 1st applicant's estate any such notification of sale setting out the details required of it by the auctioneer rules and no auction can therefore proceed on the basis of such a defective and illegal notice.
8. The applicants further argued that the 1st defendant has clogged the 1st applicant's redemption rights as the 1st defendant hold two properties belonging to the 1st and 2nd applicants as security for sums owed to it. The property advertised for sale that is LR No 3734/96 is valued at Kshs 170,000,000 and the total amount which the 1st defendant purports is due is Kshs 60,864,002.43.

Respondents Case

9. It was the respondent's case that the applicants are vexatious having brought 4 previous applications on similar grounds seeking orders for injunction in the suit to block the auction of the suit properties. All five applications dated October 18, 2016, June 29, 2017, August 3, 2017, August 15, 2017 and October 17, 2018 have been heard and decided by this court.
10. On October 18, 2016 the plaintiffs took out this suit together with a notice of motion seeking orders for injunction to stop an auction which had been scheduled for December 15, 2016. This court made an order on April 20, 2017 directing the plaintiff to propose to the 1st defendant repayment of the sum admitted by the plaintiff namely Kshs 22,218,715.91 failing agreement, the court was to give judgment for that sum and the main suit was to proceed to expeditious trial.
11. The 1st defendant was dissatisfied with the said order granting the plaintiffs liberty to decide how to repay the admitted debt and applied for review vide its application dated May 31, 2017. By Consent the parties agreed that the plaintiff pay the 1st defendant Kshs 7,000,000 before July 5, 2017, Kshs 15 million before September 5, 2017, Kshs 22 million before November 6, 2017 and at the event of default of any one payment the 1st defendant be at liberty to proceed with the sale of he suit property.
12. The plaintiff's defaulted to pay the first 7 million that was due for payment on July 5, 2017 and instead took out a notice of motion dated June 29, 2017 seeking to stay the consent. The application was opposed by the replying affidavit of Aldrin Ojiambo. The plaintiffs having defaulted payment the 1st defendant was at liberty to proceed with the auction of the suit properties and therefore instructed the 2nd defendant auctioneer to advertise the suit properties for sale when the plaintiffs took out notice of motion dated August 3, 2017 seeking to stop the auction which was scheduled for August 30, 2017.
13. On August 15, 2017 the plaintiff took out another application seeking similar orders of injunction to stop the same auction of August 30, 2017. The defendants opposed both applications vide replying affidavit of Olga Leila Sechero and Elizabeth Muigai both sworn on August 17, 2017. The two applications were heard and determined by Hon Justice Ochieng on August 30, 2017 who declined to stop the auction. The auction proceeded as planned but the bids received were below the reserve price and the suit properties were not sold.
14. Soon after the 2nd defendant advertised the suit properties for sale for a second time on September 27, 2017, the plaintiffs wrote to their advocates on September 13, 2017 indicating their intention to sell the suit properties by private treaty. On September 25, 2017 the plaintiffs wrote to them and disclosed that they had a ready buyer, Kingston Construction Limited for LR 3734/96 and sought cancellation



of the auction scheduled for September 27, 2017. They were informed of the terms which the bank would act but never responded.

15. On October 17, 2017 the plaintiffs took out another application seeking similar orders of injunction to stop the auction of October 31, 2017 and the respondents opposed both applications.
16. The auction complained of in the present application is now passed and the prayers seeking to stop the said auction are now overtaken by events. The plaintiffs despite their admitted indebtedness have refused to repay the loan taken from the bank since 2010 and yet continue to file suits and applications all with the sole intention to derail the bank from realizing its securities.

Issues For Determination

17. This court has carefully heard the submissions of the parties and the issues that has arisen for determination are;
 - a. Whether the application herein in res judicata?
 - b. Whether to grant a temporary injunction on LR No 3734/96?
 - c. Whether to discharge the Charge over title Number Nairobi/Block32/324?

Analysis

Whether the application herein in res judicata;

18. The defendants in their submissions have argued that the application herein by the plaintiffs is res judicata. It was their contention that the plaintiff raised the issue of injunction in their motion dated October 18, 2016 which was heard and settled by the ruling of the court on April 20, 2017. And consent order dated June 5, 2017.
19. The principal of res judicata is found in Section 7 of the [Civil Procedure Act](#) which provides that:

“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.”

20. In the case of [Kenya Commercial Bank Limited v Benjob Amalgamated Limited & Another, \[2017\] eKLR](#), the Court of Appeal extensively considered the principle of res judicata and held as follows:

“...The elements of res judicata have been held to be conjunctive rather than disjunctive. Expounding on the rationale of the doctrine, the Court of Appeal remarked as follows in the recent appeal; [Independent Electoral & Boundaries Commission v Maina Kiai & 5 others \[2007\] eKLR](#):

“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 common-sensical 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 forces 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 and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

21. On examination of the record this court notes that the applicants on August 3, 2017 and August 15, 2017 applied for an injunction against auctions that were set to take place on August 30, 2017 and this court in its ruling dated August 30, 2017 declined to grant the said orders. The applicant has once again approached this court to grant an injunction on the said suit property. It is clear that the applicants are seeking to reopen an issue which was previously heard and determined and therefore this court is satisfied that the doctrine of res judicata applies as the instant application has all the elements thereof.

Whether to grant a temporary injunction on LR No 3734/96?

22. Having determined and found that the application for injunction is res judicata there is therefore no need for this court to revisit and belabour itself in addressing the second issue

Whether to discharge the Charge over title Number Nairobi/Block32/324?

23. On whether to discharge the charge over title number Nairobi/Block32/324, it is this court view that this issue goes to the substratum of the matter and cannot therefore be determined at the stage of an interlocutory application and it should await full trial.

Findings & Determination

24. In light of the above, this court makes the following findings and determinations;
- i. This court finds that the application dated April 9, 2018 seeking temporary injunctive orders over LR No 3734/96 is found to be res judicata and therefore without merit;
 - ii. The orders seeking to discharge the Charge over title Number Nairobi/Block32/324 to await full trial;
 - iii. The application in its entirety is hereby dismissed with costs to the respondent;
 - iv. The matter be mentioned on October 27, 2022 before the Deputy Registrar for case management.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 21ST DAY OF OCTOBER. 2022.

HON A MSHILA

JUDGE

In the presence of;

Owino for the Applicant

Liboma holding brief for Ojiambo for the 1st Respondent

Muturi for the 2nd and 3rd Respondents

Lucy-----Court Assistant

