



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 3 OF 2020

FATMA TAHIR SHEIKH SAID (Suing as the Administrator of the Estate of

TAHIR SHEIKH SAID AHMED (Deceased).....PLAINTIFF/RESPONDENT

VERSUS

KCB BANK KENYA LIMITED.....DEFENDANT/APPLICANT

Coram: Hon. Justice R. Nyakundi

Kamoti Omollo Advocates for the Plaintiff/Respondent

Munyao Muthama & Kashindi Advocates for the Defendant/Applicant

RULING

The motions herein one filed on 19.2.2020 concerns an application for an order of injunction do issue restraining the defendant/respondent by itself, its servants and or agents or otherwise, howsoever from alienating, selling, disposing off or in any other manner dealing with the plaintiff's property known as **portion 10801 Malindi Title CR 34037** and **portion No. 11215 Malindi Title CR 46603** pending the hearing and determination of the suit herein.

The grounds on which the application for injunction are based are that:

- (a). The letters of offer, charges and guarantees upon which the defendant seeks to exercise a statutory power of sale of the deceased properties were never executed by the deceased.**
- (b). That the deceased estate has not been served with any notices prescribed by Sections 90 and 96 of the Land Act 2012 as well as the Auctioneers Rules 1997 as should precede any sale that any sale of the deceased properties on account of the aforesaid documents would therefore be unlawful, null and void, and would expose the deceased's estate to the sore of injury and is injustice not capable of being adequately redressed by way of damages.**

In addition, **Fatma Tahir** filed an affidavit as a personal representative of the deceased's estate challenging the exercise power of sale of the dependant.

On 27.2.2020, the respondent through a replying affidavit of one **Francis Kiranga** opposed the notice of motion laying down extensive averments with all indications:

- (a). That the matters raised in both the suit and notice of motion are resjudicata.**
- (b). That, the same issues ought to have raised and determined by the Court in a Ruling delivered on 12.5.2017 in Malindi ELC No. 2 of 2016 the parties being Kaab Investments Limited & Tahir Sheikh Ahmed v Kenya Commercial Bank Ltd.**
- (c). That the claim of the charges that form the Bank's exercise of statutory power of sale has previously been expressly admitted by the Late Tahir Sheikh Said Ahmed in pleadings filed in Court in previous litigation.**

In this affidavit as discerned from the annexures which included the following: Certificates of title to the suit properties, charge document dated 13.11.2009 and a further charge dated 30.8.2011, Bank statements denoting the debt of Kshs.32,617,383.67/= and USD 2,426,895.42

due and owing to the Bank as at 25.2.2016. Pleadings including the Replying affidavit in the said Malindi ELC Case No. 2 of 2016, Notice of Motion dated 6.6.2017 together with the Letters of Administration used to institute the suit, Forensic document examiners report, statutory invoices to **Isha Mohamed Noor** and served by the Bank pursuant to the provisions of Section 96 (2) of the Land Act 2012 together with the affidavit of service.

It is against this background that the respondent on 28.10.2020 filed a further notice of motion expressed to be brought under Section 1A, 1B, 3A & 6 and 7 of the Civil Procedure Act entrenching prayers for the notice of motion dated 19.2.2020 to be struck out for being *res judicata* due to the outcome and determination of the Court in the motion dated 11.1.2016 in **Malindi ELC Case No. 2 of 2016 by Kaab Investments Ltd & Tahir Sheikh Said Ahmed v Kenya Commercial Bank Ltd.**

That the suit filed by the plaintiff in the Complaint dated 19.2.2020 filed in Court on 19.2.2020 together with the ensuing proceedings be struck out on account of being subjudice to **Malindi ELC Case No. 2 of 2016, Kaab Investments Ltd & Tahir Sheikh Said Ahmed v Kenya Commercial Bank Ltd and Malindi ELC Case No. 240 of 2017.** That the suit properties known as **LR Number 11215 CR. 46603 and LR Number 10801 CR 34037** hereinafter referred as the suit properties remain to be the subject of litigation in **Malindi ELC Case No. 2 of 2016 and Malindi ELC Case Number 240 of 2017.**

In buttressing the materials in support of their respective position both counsels filed written submissions. In considering whether an injunction in respect of notice of motion dated 19.2.2020 ought to be granted, the Court has to bear in mind the test on *res judicata* raised in the respondent's motion of 28.10.2020.

Determination

The issue which the respondent raised in answer to the applicants earlier notice of motion on account of *res judicata* under the mortgage deed forms the basis of determining both applicants by this Court. In assessing whether the relief in notice of motion of 19.2.2020 is *res judicata*, it is therefore legitimate for me to form a provisional view of the guiding principles and the disputed facts which have been adverted to by the parties.

The ultimate question for now is whether an application for injunction has real prospect of success for the sole reason that its *res judicata*.

The Law

The threshold for determining whether a matter is *res judicata* as prerequisite condition to strike it out of the purview of the Court is clearly stated under Section 7 of the Civil Procedure Act. A reading of the Section established that a plea or claim to be rendered *res judicata* the following conditions must exist:

(a). The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit. A matter directly and substantially in issue is every matter in respect of which relief is claimed in a suit. A matter cannot be said to be directly and substantially in issue unless it was alleged by one party and denied or admitted, either expressly or by implication, by the other side. It is not enough that the matter was merely alleged by one party.

(b). The matter must be between the same parties or parties under whom they or any of them claim. Since Judgments and decrees bind only parties and their privies (those claiming under them) it must be that besides a repeat of the issues litigated previously, there is also a repeat of the parties to the action. Parties to an action are those whose names are on the record at the moment a decision is passed and it does not matter that such party was not on the record at commencement of proceedings. Similarly, if in the course of proceedings but before decision, a party is struck off the record or dies then he ceases to be a party and a plea of *res judicata* cannot be sustained if the parties are different.

(c). Litigating under the same title. Parties in the subsequent suit must have litigated in the same capacity in the former suit. A verdict against a person suing in one capacity will not stop him when he sues in another distinct capacity, since he will in fact be a different person in Law. Thus where a suit is brought by a person for recovery of property of a deceased in his capacity as heir, but the suit is dismissed because he fails to prove grant of Letters of Administration, such dismissal would not operate as a bar if he later brings the suit in the capacity of trustee of the estate.

(d). Court competent to try such subsequent suit or the suit in which the issue has subsequently raised. To successfully plead *res judicata*, it is necessary that the Court which tried the former suit must have been a Court competent to try the subsequent suit. A decree in a former suit cannot therefore be pleaded as *res judicata* in a subsequent suit unless the judge by whom it was passed had jurisdiction to try and decide, not only the particular matter in issue, but also the subsequent case in which the matter is subsequently raised.

(e). Has been heard and finally decided. The fact that a matter directly and substantially in issue in a suit was directly and substantially in issue in a former suit is not sufficient ground to plead *res judicata*. It should have been heard and finally decided in the sense that a Court applies its judicial mind and comes to a decision on a contested matter after argument and consideration. An obiter dictum nor a mere expression of opinion in a Judgment does not have the effect of *res judicata*.

From the above provisions the Courts have taken similar positions to pronounce themselves and make such orders therein as may be expedient and interest of justice in the matter. In **Harbajam Singh Sembi v Lakeland Motors Ltd HCCC No. 227 of 1997:**

“A party will not be allowed to canvass fresh matters, which could have been canvassed in an earlier application.”

Visram J. in *Samwel Kiiru Gitau v John Kamau Gibui HCCC No. 1249 of 1998* had this to say:

“For a matter to be *res judicata*, it must be one which the Court has previously exercised its judicial mind and has, after argument and consideration, come to a conclusion on the contested matter and for this reason a matter is said to be *res judicata*.”

My reading of Section 7 of the Act is clear that *res judicata* also applies also to applications in the same strength as it applies to suits. The import of the doctrine of *res judicata* was also stated in the case of *Benson Ngugi v Francis Kabui Kinyanjui & others CA No. 1 of 1986 {1989} KLR 146* and as per *Gachuhi JA* observed:

“It is a fundamental doctrine of all Courts that there must be an end to litigation. In Law any litigation has to come to an end and once a decision has been reached by a competent Court it cannot be re-opened to be started all over again unless the decisions reached has been set aside. Any decision reached if not set aside, it can only be challenged on appeal and cannot be challenged in the same Court except in case of review.”

The question as to whether this Court has jurisdiction to grant interlocutory orders in the nature of an injunction as premised the notice of motion dated 19.2.2020 was also long settled when the Court stated as follows in *Kamunye & Others v Pioneer General Assurance Society Ltd {1971} EA 263* thus:

“A party who brings for the decision of the Court matters which have already been determined can truly be said to be abusing the process of the Court.”

It is clear to the Court that even interlocutory applications conclusively determined are not excluded in the application of *res judicata* as an estoppel to file similar applications to be heard and grant the reliefs specifically under the same subject matter.

On this issue *Andrews* in interest *res publicae ut finis litium* observed:

“That, without finality of decisions, litigants and indeed the legal system as a whole would be exposed to many hazards, that a dispute might continue to drag on, greater legal expense and delay might result, scarce judge time might be spent re-hearing the matter, inconsistent decisions might follow. Litigation would cease to be a credible means of settling disputes; the victorious party in the first case would be deprived of the legitimate expectation that the first action would not be merely address rehearsal for further contests.”

It is evident from these principles that a decision of the Court for *res judicata* purposes is a decision which determines a question of Law, fact or both Law and fact: (See also *Henderson v Henderson {1843} 3 Hare 100, 115*).

In my view, the use and application of the doctrine of *res judicata* invites the adherence to the precise definition of the term same transactions. On the facts of the case thus in the restatement of Judgment (24 (12), *Alary Corp v Sims 283 B. R 549, 557*) it was formulated as follows:

“What factual groupings constitute a transactions and what groupings constitute a series are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a result conforms to the parties expectations or business understandings or usage.”

Therefore, I hold the view that a claim in a suit is understood to be an entity of facts which all describe logical unit and sequence of events to a specific transaction. This one ascertained unit which forms the dispute in Court may not be split in various forums. The litigating party is precluded from filing suits related in their facts and evidence. Forming the same claim or transactions in subsequent proceedings. That is the predominant principle in *Henderson v Henderson*. Whether or not the legal questions as framed by the applicant in the motion dated 19.2.2020 were indeed canvassed and determined by the Court in *ELC No. 2 of 2016* on 2.5.2017 is a substantive question that falls relevant at this juncture.

All what the respondents contends is that the application does not raise any new issues nor does it disclose that the matter has already been a subject of litigation before the ELC Court at Malindi. In persuading the Court to grant the orders of injunction, it is evident that the applicants presents their case as a fresh claim.

In my view, this is also a case where the applicants are bound by the issues determined in the stated proceedings presided over by *Angote J. in ELC Case No. 2 of 2016*. Consequently, from the affidavit evidence of the applicant and replying affidavits with annexures deposed to by the respondent, I can draw an inference that there is privity of parties in *ELC No. 2 of 2016* with ones litigating in *HCCC No. 3 of 2020 at Malindi*.

The comparative Court in the case of *Head Waters Inc. Forest Conservation Council v US Forest Service 382, F 3d 1025 are circuit 1997* had occasion to give direction on this question of privity of parties to the same transactions to justify invoking *res judicata* thus:

“First, a non-party who has succeeded to a party’s interest in property is bound by any prior Judgment against the party. Second, a non-party who contracted the original suit will be bound by the resulting Judgment. Third, federal Courts will bind a non-party whose interests were represented adequately by a party in the original suit. In addition, privity has been

found where there is a substantial identity between the party and non-party, where the non-party had a significant interests and participated in the prior action and where the interests of the non-party and party are so closely aligned as to be virtually representative. Finally, a relationship of privity can be said to exist when there is an express or implied legal relationship by which parties to the first suit are accountable to non-parties who file a subsequent suit with identical issues.”

Consequently, a perusal of the record presents prima facie evidence that there are substantial interlocking issues in **ELC Case No. 2 of 2016 and 240 of 2017**, with the pending suit referenced as **HCCC No. 3 of 2020**. Given that position the applicant seeks to ventilate the issues revolving around the Mortgage Deed allegedly entered into between **Tahir Sheikh Said Ahmed (now deceased)** and **KCB Bank Kenya Ltd**. On the other hand, litigating as the defendant in all the aforementioned suits.

Clearly, this is a case where the applicant is bound by the issues determined in the proceedings before the **ELC Court in Case No. 2 of 2016**. In my view, there exist legal relationship between the predecessor **KAAB Investments Ltd & Tahir Sheikh Ahmed v KCB Bank Ltd in ELC No. 2 of 2016** and successors as owner of interest in the property namely, **Isha Mohamed Noor and Hamude Ahmed Said** in the same suit as legal representatives to the Estate of the deceased **Tahir Sheikh Said Ahmed**.

As the record stands there is a judicial decision pursuant to an application dated 11.1.2016 in **ELC No. 2 of 2016** which sought to invoke the Court's jurisdiction for grant of an injunction against the defendant Bank and **Garam Investments Auctioneers** or their agents from advertising, or offering for sale, or selling or in any way alienating propriety interests in suit properties referenced as **LR 10801 CR 34037 and Portion No. 1121 CR 46603. Suit No. 10801 CR 34037 and Portion No. 11215 CR 46603**. Pending the hearing and determination of the suit among other reliefs. That application was heard and determined on 2.5.2017 by the Court.

The decision is binding to the predecessors and successors to the claim and cannot be reconsidered by another Court unless new facts emerge that change the basis on which they were rendered. The dispositive of the decision on injunction and closely related matters therefore becomes *res judicata* as regards matters which were distinctively raised and litigated in the application dated 11.1.2016.

In my view, the parties cause of action and objects of litigation in **ELC 240 of 2017** and **HCC Number 3 of 2020** are identical in all three suits. This triple identity test is contained in Section 7 of the Civil Procedure Act which states in relevant part that there is a previous suit in which the current matters were raised and determined, the subject matter to the claim was the same that the parties litigated based on the same grounds, competent Court heard and determined the issue. That issue on the face of it has been raised in the new litigation again as a fresh claim for the same relief.

In my view and on examination of the circumstances of the primary application of 19.2.2020 and the rejoinder motion thereafter filed on 28.10.2020 as distinct application and also in defence to the initial motion by the applicant, I hold that *res judicata* effect attaches to the interlocutory issues in the prior Ruling of the Court pronounced to the parties on 12.5.2017.

It is also clearly evident from the record and the sets of pleadings outlined by the respondent in reply to the notice of motion of 19.2.2020 as read together with notice of motion of 28.10.2020 that issues in the pending suits in **ELC Case No. 2 of 2016, ELC Case No. 240 of 2017 and HCCC No. 3 of 2020** discloses that the cause of action in each case is the same.

I strongly find it offensive to the judicial process for the plaintiffs not to raise their entire claim in one action and not litigate by instalments or parts in separate cause of action and at different Courts. If, in any event it's the plaintiffs view that both ELC and High Courts exercise their respective jurisdictions justice will be best served by not having simultaneous litigation on the same issues proceeding on the basis of comity and forum of non-convenience. The parties must redraw the boundary of issues that give the respective jurisdiction to the Courts to entertain the same cross-cutting matters raised in the suits. This is justified substantially and directly on the plaintiff claim not being *res – subjudice*.

In the instant case, the initial chosen Court of ELC should have been given an opportunity to hear and decide the case before filing a parallel suit in **HCCC No. 3 of 2020**. Whichever angle one takes and looks at this dispute, the truth is the two Courts cannot purport to entertain this suits appropriately and simultaneously without a manifest of injustice or mistrial and the likely conflicts in the outcome of the decisions of the Courts; given the nature of the pleadings and other relevant materials presented by both parties.

It appears to me that if there is a case in which the Court has to re-order procedural orderliness based on the Mortgage agreement and the exercise statutory power of sale that created rights that are in all respects exactly the same as formulated be in the context of litigation be heard by the proper Court. The parties are estopped to file more than one Plaint in relation with same factual matrix and initiate them at different Courts with equal status.

As before submitted by the respondent counsel, this overlap concerns this Court's jurisdiction as well as the fair administration of justice. The doctrine of *res judicata* here is outweighed by the policy against permitting the Court to act beyond its jurisdiction in essence assumption of jurisdiction over **HCCC No. 3 of 2020** without a definitive order as what has happened to the same issues in **ELC. No. 2 of 2016**. Economy of time, of the Courts, the beneficial results of the doctrine of *res judicata* and estoppel features becomes increasing important in these motions filed by the parties.

In the result, bearing that statement of principle under Section 7 of the Civil Procedure Act in mind and taking all other factors of this case, I think this is a proper case to exercise my discretion in the respondent's favour. I accordingly decline the motion dated 19.2.2020 for being fatally incompetent for reason of *resjudicata*. It is therefore struck out with costs to the respondents. Having stated as I thought to be necessary to avoid parallel proceedings before the chosen Courts, I exercise jurisdiction under Section 1A, 1B and 3A of the Civil Procedure Act to suspend proceedings that are covered exclusively in **HCCC No. 3 of 2020** pending the hearing and determination of **ELC No. 240 of 2017** to give effect to both the particular cases, the objects and the grounds of the claim to be conclusively heard and determined.

The instant suit involves matters already filed at the Environment and Land Court Registry which has neither been withdrawn or determined

under Section 6 of the Civil Procedure Act the jurisdiction of the Court is limited in the following context:

“No Court ought to proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previous instituted suit or proceeding, and or the previously instituted suit or proceedings is between the same parties and or the suit is pending in the same or any other Court having jurisdiction to grant the reliefs claimed.”

For that reason, the applicant notice of motion falls short on the doctrine of *res sub-judice* under Section 6 of the Civil Procedure Act as there is a suit on the same cause of action.

The question whether there; would be ultimately a pending issue formally to be adjudicated and sufficiently decided separately by the Court is moot.

To this end and without mercy, matters adverted to by the applicant are offensive to the provisions under Section 6 and 7 of the Civil Procedure Act on *res sub-judice* and *res judicata* respectively. It is therefore good for striking it out and in its place the respondent motion succeeds with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF FEBRUARY, 2021

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Omondi advocate for the respondent