REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 310 OF 2018

SUPER DRILL INTERNATIONAL LIMITED.....PLAINTIFF

VERSUS

SIDIAN BANK LIMITED.....DEFENDANT

RULING

(On Notice of Preliminary Objection by the Defendant Dated 29th April, 2020).

1. By notice of Preliminary Objection (hereafter PO) dated 29th April, 2020, the Defendant asks this court to strike out or dismiss the suit on the ground that it lacks jurisdiction to hear and determine the suit on the following grounds:

a) **That the instant suit is *res judicata* as it offends Section 7 of the Civil Procedure Act, Cap 21, Laws of Kenya given that the subject matter of the claim herein was marked as settled by a consent that was adopted as a Court Judgment on 31st October, 2016 in Kajiado HCCC NO. 8 Of 2016 – SUPER DRILL INTERNATIONAL LIMITED V SIDIAN BANK LIMITED and a decree issued thereto on 10th November, 2016, as such any contrary decision in this matter may embarrass this Honourable Court.**

b) **That the verifying affidavit accompanying the Plaint in the instant suit offends Order 4 Rule 1(1)(f) of the Civil Procedure Rules, 2010 given that the Plaintiff has admitted that there has been another previous proceeding in another Court between the same parties over the same subject matter.**

c) **That the Plaintiff's claim before this court is a deliberate abuse of Court process by invoking a multiplicity of proceedings for the collateral purpose of imputing an otherwise lawful process while the contested issues were settled before a court of competent jurisdiction.**

d) **That in the circumstances, the Plaintiff's suit and the orders or prayers sought therein are a monumental procedural and legal nullity, abuse of the Court process, vexatious, mischievous and a proper candidate for dismissal and or striking out with costs.**

Defendant's submissions

2. Parties agreed to canvass the PO by way of filling written submissions and subsequently highlight them. On the part of the Defendant, learned counsel, Mr. Oguye relied on submissions dated 24th June, 2020 filed by Mwamuye, Kimathi & Kimani Advocates which he chose not to highlight. In the submissions, counsel demarcated two issues for determination, namely whether the PO as taken is well founded and valid and whether the instant suit is *re judicata* as it offends Section 7 of the Civil Procedure Act given that it relates to another suit filed in Kajiado HCCC No. 8 of 2016- Super Drill International LTD V Sidian Bank Ltd.

3. On the first issue, counsel submitted that a PO must be argued on a point of law having regard to the assumption that all facts pleaded are correct. The case of **Salome Wambui Njau (Suing as the Administratatix of the Estate of Peter Kiguru Njuguna (deceased) v Caroline Wangui Kiguru (2013) e KLR** where it was held that:

"… a preliminary Objection must be on a pure point of law and cannot be raised if any fact has to be ascertained. The issues of whether this court has jurisdiction and whether this matter is sub judice are pure points of law as they have the potential of

determining this matter with finality without the need of ascertaining any additional facts."

4. The Defendant thus set out three tests that must be satisfied before a PO can be argued, firstly, that it should raise a point of law, secondly, that it is argued on assumption that all facts pleaded are correct and thirdly, that it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial authority.

5. It was submitted that the Defendant had met the three tests and as such the PO was properly before the court.

6. Whilst restating Section 7 of the Civil Procedure Act, counsel cited the case of **North West Water Limited v Binnie & Partners (1990)3 ALL ER, 547** where the court underpinned the principle that since an issue had been raised in a separate proceeding the court would not allow it to be litigated in a different proceeding between different parties arising out of identical facts and dependent on the same evidence. The rationale was that the party was trying to re-litigate the issue and so was prevented by the issue of estoppel and amounted to an abuse of the court process.

7. According to the Defendant, the Plaintiff filed **Kajiado HCCC No. 8 of 2016 – Super Drill International Ltd** (here after the Kajiado case) in which similar prayers as in the instant suit were raised and which also related to the same subject matter and parties.

8. It is submitted that on 31st October, 2016, the Kajiado case was marked as settled and a Consent Judgment adopted. Subsequently, a Decree in this regard was issued on 10th November, 2016. The case of **Chepotula Tongelech v Jackson Chamir & 2 others (2019**) **e KLR** was cited to buttress a similar position.

9. Counsel urged the court to find for the Defendant in the spirt of protecting the court's reputation and preventing unending litigation. For this reason, it was advanced that, by filling the suit, the Plaintiff was perpetuating the abuse of the court process.

Plaintiff's Submissions

10. The Plaintiff, in opposing the PO relied on written submissions dated 14th October, 2020 filed by F.K. Omeyo & C. Advocates. In attendance in court was learned counsel, Mr. Wambua. It is argued that the PO is unfounded, vexatious, an abuse of the court process and calculated to delay the hearing.

11. While submitting that the PO did not meet the threshold of the elements set out under Section 7 of the Civil Procedure Act (hereafter the Act), counsel argued as follows:

12. First, that the suit herein or the issue in the suit is not directly and substantially in issue in the Kajiado case. It is argued that the subject matter in the Kajiado suit was Kajiado/ Ntashart/471 amongst 1577, 1578 and 1581 whilst in the instant suit there is no such subject matter. The argument supporting this is that the land Kajiado/ Ntashart/471 was sub divided with the consent of the Applicant (Defendant) which gave rise to two portions, namely Kajiado/ Ntashart/14740 and Kajiado/ Ntashart/14741 wherein Kajiado/ Ntashart/14740 was sold and transferred to Sheria Housing Co-operative Society at a consideration of Ksh. 30,000,000/ and the proceeds thereto paid to the Defendant in part settlement of the loan.

13. It is added that the charge that had been registered by the Defendant against Kajiado/Ntashart/471 was discharged to pave way for the sub division, hence the said parcel of land is non-existent. Further that parcel **No. Kajiado/Ntashart/14741** which is the subject matter of the instant suit has neither been charged nor offered as security to the Applicant. As such, there is no similarity of the land in the present suit and that in the Kajiado case.

14. Second, as to whether the parties litigating are under the same title, counsel submits that this issue is not in dispute. That however, the subject matter of litigation is different.

15. Third, is whether the issue in the instant suit was heard and finally determined in the Kajiado case. It is submitted that in the Kajiado Case the issue at hand was whether the court was justified in issuing restraining orders against the Defendant therein from exercising its power of sale on the land parcel No. **Kajiado/Ntashart/14741** which is neither charged nor offered as a security to the Defendant for a loan facility.

16. In this regard, it is argued that the development of fresh circumstances as distinguished from a mere discovery of fresh evidence on matters which have been open for controversy in the earlier proceedings may found a new case. That further the fact that new circumstances touching on the same subject matter between the same parties or those who claim under them may not necessarily raise the same issues for determination on both occasions. The case of **Kibugi v Mukobwa & Another (1993) e KLR** was cited to buttress this submission.

17. Four, is whether the court that heard and determined the issue was competent to try the subsequent suit or the suit or the suit in which the issue is raised. In this respect, counsel submitted that the jurisdiction of the court that heard the Kajiado case is not in issue. That the distinguishing factor is that the issues raised in the instant suit and/or relief sought are totally different from the issues in the Kajiado suit.

18. On the whole, counsel submitted that the PO had no merit and ought to be dismissed. In lieu thereof, the court was urged to exercise its inherent powers under Section 3A of the Civil Procedure Act and make such orders as would meet the ends of justice and prevent the abuse of the process of court and consequently disallow the PO as the Defendant would suffer no prejudice if the suit proceeded to a full trial.

19. In oral submission, learned counsel, Mr. Wambua merely summarized the written submissions and I need not reiterate the same.

20. In rejoinder, Mr. Obuye restated that the PO was meritorious emphasizing that the suit property in the Kajiado case was Kajiado/Ntashart/471which essentially is the same in issue in the instant suit. He thus argued that the PO was merited and urged the court to allow it.

Analysis and determination

21. I have considered the PO together with the respective rival submissions. I have demarcated two issues for determination, namely whether the Preliminary Objection is properly before the court and whether the suit herein is res judicata.

Whether the Preliminary Objection is properly before the court and therefore valid.

22. On this issue, the same is premised on the ground that, the Plaintiff in opposing the PO argued that the PO is unfounded, vexation and an abuse of the court process intended to waste judicial precious time that would otherwise be utilized in canvassing the suit. In that case, the question that this court must answer is what constitutes a preliminary objection.

23. In the case of **Nitin Properties Ltd V Jagit S. Kalsi & Another [1995]e KLR,** the Court of Appeal whilst citing its own ruling in ***Pan Africa Builders & Contractors Ltd & another vs Jogdish Singh*, (CA No 52 1995)** reiterated that:

> ***"Quite unprocedurally and based on preliminary objection supported by an affidavit sworn by the second applicant the applicants applied for a stay of proceedings in the superior court. That is most unusual. It is clear and must be so that an objection in limine can be based on what used to be demurrer. The predecessor of this court said in the case of Mukisa Biscuit Company vs Westend Distributors Limited [1969] EA 696 at page 701: "A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse the issues. This improper practice should stop.""***

24. The Supreme Court in the case of **Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others [2015] e KLR** expanded the above principle and further gave the rationale for raising a preliminary objection. It delivered itself thus**:**

> ***"1. Preliminary objection consisted of a point of law which had been pleaded or which arose by clear implication out of pleadings and which if argued as a preliminary point could dispose of the suit. A preliminary objection was in the nature of what used to be a demurrer. It raised a pure point of law which was argued on the assumption that all the facts pleaded by the other side were correct. It could not be raised if any fact had to be ascertained or if what was sought was the exercise of judicial discretion. The Court had to be satisfied that there was no proper contest as to the facts. The facts were deemed agreed, as they were prima facie presented in the pleadings on record.***
>
> ***2. Preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts were incompatible with that point of law. In the instant case the prayer for consideration of extension of time to file a notice of appeal out of time tied with a claim that the issue had been overtaken by events was a factual issue, to be established by evidence from both parties. Therefore the Court was unable to dispose of the question, without first evaluating evidence from the parties. It raised no pure point of law on its own.***
>
> ***3. ……..***
>
> ***4. The true preliminary objection served two purposes of merit:***
>
> > ***1. it served as a shield for the originator of the objection against profligate deployment of time and other resources. and***
> >
> > ***2. it served the public cause, of sparing scarce judicial time, so it could be committed only to deserving cases of dispute settlement. It was distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."***

25. In the present case, the PO is premised on the main ground that the instant suit is *res judicata*. Regard is had to Section 7 of the Civil Procedure Act that sets out the threshold for holding that a suit is *re judicata*. This argument no doubt is a point of law and is advanced on the assumption that facts as pleaded by the Plaintiff are correct. Issues that touch on law need not be ascertained by evidence as the law speaks for itself. That applies to this case, more so on the ground that should the court find for the Defendant, the decision has the effect of entirely disposing of the suit.

26. In the foregoing, I find and hold that the PO is valid and properly before the court. I then grapple with the question of whether the suit is *res judicata.*

Whether the suit herein is res judicata

27. The principle of *res judicata* is embedded under Section 7 of the Civil Procedure Act. The same provides 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."

28. In the case of **John Florence Maritime Services Limited & Another V Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] e KLR** the Court of Appeal sitting in Malindi set out the ingredients of *res judicata* as follows:

"From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (see Karia & Another v the Attorney General and Others [2005] 1 EA 83."

29. The same Court in the decision underpinned the historical importance of *res judicata,* tracing back to centuries ago. It had this to say:

"*Res judicata* is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of Henderson v Henderson [1843] 67 ER 313:-

"…..where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time….."

See also Kamunye & others v Pioneer General Assurance Society Ltd [1971] E.A. 263. Simply put *res judicata* is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives."

30. Another case that well explained *res judicata* is that of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR)** in which the Court of Appeal held that:

"Thus, 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 disinjunctive 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."***

31. The Court set out the rationale for res judicata as:

"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."

32. In a nutshell, *res judicata* is intended to bring litigation to a halt; it is intended to bar a person who has had his day in a court of competent jurisdiction where his case was concluded from re-litigating his case afresh. In essence it saves judicial precious time and protects the sanctity of the court to do just what it should do. In sum, it prevents the abuse of the court process.

33. As this juncture, the court must decide whether the Defendant has met the threshold for the application of the doctrine of *res judicata*.

34. The first issue is ***whether the suit or issue was directly and substantially in issue in the former suit***. According to the counsel for the Defendant, the Plaintiff in the Kajiado case was, in the suit re-litigating the same suit because the parties were the same and that, by a consent judgment entered on 31st October, 2016 the suit was fully settled.

35. Annexed to an affidavit in support of the PO were two Notice of Motion applications which are similar in all respects. The first that is dated 22nd August, 2016 was filed vide **Nairobi HCCC No. 88 of 2016** before it was transferred to Kajiado High Court and metamorphosed into **Kajiado HCCC No. 8 of 2016**. The Plaintiff still filed a similar Notice of Motion dated 21st October,2016. In sum, in both the orders that were sought were to stop the sale of parcel of land Nos. Kajiado/Ntashart/471,1577,1578 and 1581. All these parcels had been charged to the Defendant bank to secure a loan of Ksh. 88,000,000/ by the Defendant.

36. The Defendant subsequently advertised the parcels for sale after the Defendant defaulted in paying the loan. Before the sale took place, parties entered into a consent dated 31st October, 2016 that disposed the Notice of Motion dated 21st October, 2016 at Kajiado High Court. Amongst the orders consented to were that the Plaintiff was at liberty to sell the properties by way of private treaties effective of 1/11/2016, that the loan be paid within 90 days effective of 1st November, 2016 and that in default of the Plaintiff settling the loan, the Defendant was at liberty to proceed with the sale of the charged properties. Consequently, the Notice of Motion dated 21st October, 2016 was marked as overtaken by events.

37. The plaint dated 22nd August, 2016 in the Kajiado case had prayers hinged on the prayers sought in the two Notices of Motion.

38. There is no contestation as submitted by counsel for the Plaintiff that by the consent of both the Plaintiff and the Defendant, the title to parcel **No. Kajiado/Ntashart/471** was discharged from the bank to allow sale and part settlement of the loan. The same was subdivided into two parcels giving rise to **Kajiado/Ntashart/14740 and 14741** respectively. Copies of these two titles are filed amongst the documents the Plaintiff shall rely on in the present suit. Indeed, Parcel No. 14740 was sold to Sheria Housing Cooperative Society for Ksh. 30,000,000/ under whose name the title is registered.

39. There is no doubt that the Plaintiff never honoured its part to liquidate the loan as per the consent of 31st October, 2016. This led the Defendant to advertising the charged parcels of land for sale. Amongst them was **Kajiado/Ntashart/471**. This is where the Defendant got it all wrong. As submitted by the Plaintiff, this parcel of land no longer exists. It expired the moment it was discharged from the bank and subdivided into other parcels of land as enunciated above.

40. Undoubtedly, the litigation in the instant case revolves around the latter parcel of land, amongst the prayers sought being that the Defendant be stopped from maliciously advertising for sale the said land. In my candid view, the Plaintiff cannot be deemed to be litigating over the same issue that was substantially in issue in the Kajiado case. Is it neither vexing the court nor re-litigating the same issue. There is a clear demarcation of the issues litigated in the two cases. In the contrary, it is the Defendant that is vexing the court with the instant application.

41. As regards ***that former suit was between the same parties or parties under whom they or any of them claim,*** there is no doubt that the parties are the same. However, the issues litigated are totally different. Moreover, nothing stops the same parties litigating over and over again so long as they do not cross the red tape of the principle of *res judicata.* The Plaintiff in the instant case is within the law to litigate its claim.

42. On whether ***those parties were litigating under the same title,*** the rationale I have applied in the second test applies herein and I need not add more.

43. As to whether t***he issue was heard and finally determined in the former suit,*** I have already made a clear distinction of the two claims. In the Kajiado case, the issue at hand was for issuance of restraining orders against the Defendant from exercising its statutory power of sale over parcels of land Nos. **Kajiado/Ntashart/471, 1577,1578 and 1581.** In the present case, the issue at hand is to stop the Defendant from maliciously advertising for sale parcel of land No. **Kajiado/Ntashart/471** which no longer exists. Hence, the current issue has never been litigated and determined by a court of competent jurisdiction.

44. May I add that, contrary the Defendant's submission that the Kajiado case was fully settled by the consent of 31st October, 2016, is the fact that the suit ought be alive. As clearly spelt out in the terms of the consent, the same only settled the Notice of Motion dated 21st August, 2016 unless otherwise as at date the suit has been heard.

45. So now, ***was the court that formerly heard and determined the issue competent to try the subsequent suit or the suit in which the issue is raised?*** Again, I concur with the Plaintiff. The competence of the court that heard the Kajiado case has not been called into question. The jurisdiction of this court is also not questioned. The fact is that the issues raised in the present suit as well as the reliefs sought are entirely different from those raised and sought in the Kajiado suit.

Disposition

46. In the premises, I find that the present application is totally unmerited. The Defendant has failed to satisfy the conditions for the application of the doctrine of *res judicata*. I dismiss the Preliminary Objection dated 29th April, 2020 with costs.

Dated and delivered at Nairobi this 18th March, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Oguye for the Defendant/Applicant.

2. No appearance Mr. Omenya for the Plaintiff/Respondent.