



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 46A OF 2020

FAMILY BANK LIMITED.....PLAINTIFF/1ST RESPONDENT

VERSUS

YUSSUF HASSAN MUBWANA.....DEFENDANT/APPLICANT

NDUTUMI AUCTIONEERS.....2ND RESPONDENT

RULING

1. The defendant/applicant filed a Notice of Motion application dated 15th January, 2021 brought under the provisions of Articles 22, 23(3) & 40 of the Constitution of Kenya, 2010, Sections 90(2) & (3), 96, 97 of the Land Act, 2012, Sections 1A, 1B, 3, 3A and 63 of the Civil Procedure Act, Order 40 Rules 1, 2, 3 and Order 51 of the Civil Procedure Rules, Section 44 of the Banking Act as amended, the Auctioneers Act and the Auctioneers Rules and all other enabling provisions of the law. The defendant/applicant seeks the following orders-

i. Spent;

ii. Spent;

iii. That a temporary injunction do issue against the respondents their agents/servants restraining them from selling, auctioning, dealing, interfering, alienating or disposing of all those parcels of land belonging to the applicant to wit Kwale/Shimoni Adj/590, Kwale/Shimoni Adj/671 and Kwale/Vanga/23 respectively, pending the hearing and determination of the main suit;

iv. That the 1st respondent be compelled to provide a current/updated loan statement accounts of all facilities advanced to the applicant to inform a Court mandated independent audit and determination of the applicant's true level of indebtedness by an auditor jointly appointed by the parties or the Honourable Court as shall be agreed;

v. That a Court mandated independent valuation of the suit properties be conducted by a registered valuer jointly appointed by the parties or the Honourable Court as shall be agreed before the hearing and final determination of the main suit; and

vi. That costs of this application be provided for.

2. The application is anchored on the grounds on the face of it and the supporting affidavit sworn on 15th January, 2021 by Yussuf Hassan Mubwana, the defendant/applicant.

3. In response thereto, the plaintiff/1st respondent on 1st February, 2021 filed a replying affidavit sworn on 28th January, 2021, by Ivy Ngui, an Advocate of the High Court of Kenya. The 1st respondent also filed a Notice of Preliminary Objection on 1st February, 2021. The Preliminary Objection is premised on the following grounds:

i. That the application filed herein is incompetent, fatally and incurably defective and is an abuse of the Honourable Court for the following reasons-

a. The orders sought in the application are directed against an entity that is Ndutumi Auctioneers, who is not a party in the suit.

b. The application introduces a new cause of action that is *ipso facto* not vested in the suit and should be struck out with costs.

ii. That the defendant's application is based on an incurable illegality and ought to be struck out forthwith with costs to the plaintiff.

4. On 1st February, 2021, directions were given to the effect that the Court would first deal with the Notice of Preliminary Objection dated 28th January, 2021 and that the same would be canvassed by way of written submissions. The 1st respondent's submissions were filed on 4th March, 2021 by the law firm of Maina & Onsare Partners Advocates while the applicant's submissions were filed on 4th March, 2021 by the firm of Sethna Atonga & Company Advocates. The said submissions were later highlighted.

5. Ms. Wangu, learned Counsel for the 1st respondent submitted that Ndutumi Auctioneers (2nd respondent) had been introduced by the applicant in the application dated 15th January, 2021, where the applicant was seeking injunctive orders against the 1st and 2nd respondents, whereas the latter is not a party to the suit. She submitted that the plaint had not been amended and the applicant had not filed an application for joinder of the 2nd respondent to the suit.

6. She submitted that the applicant's application was an attempt to circumvent rules of procedure as provided in Order 1 Rule 10(2) of the Civil Procedure Rules, 2010, by enjoining the 2nd respondent without leave of the Court. Learned Counsel contended that the applicant was thrusting upon the 1st respondent a party against whom it has no cause of action. She also submitted that the misjoinder of the 2nd respondent cannot be regarded as a procedural technicality under Article 159 of the Constitution of Kenya for reasons that the said joinder is irregular, unprocedural and unlawful, thus fatal. It was claimed by the 1st respondent that the foregoing changes the character of the suit and that it can only lead to the filing of a fresh suit.

7. Ms. Wangu stated that the suit by the 1st respondent is for recovery of the sum due and owing under the loan instruments and Section 93 of the Land Act. She further stated that the cause of action in the 1st respondent's suit is for recovery of the amount owing under Section 90(3) of the Land Act, while the cause of action in the applicant's application is on the bank's statutory power of sale under Section 96(2) of the Land Act.

8. It was submitted by Ms Wangu that the bank's power of sale is a remedy provided for in the loan instrument and Section 96(1) of the Land Act but the applicant seeks to injunct the 1st respondent from exercising its power of sale by realizing the charged properties. Counsel for the 1st respondent contended that both causes of action arise from the loan instruments and the Land Act but they are very distinct since the 1st respondent's statutory power of sale is exercised upon default and issuance of the relevant statutory notices, while recovery is exercised where the bank does not wish to realize the charged properties but instead opts to sue.

9. She submitted that the joinder of the 2nd respondent is not a procedural technicality since it goes to the root of the application and that the said respondent has never been served with summons. That it had no clue of the suit and it was not a party to it, hence the Notice of Preliminary Objection should be allowed and the applicant's application struck out with costs.

10. Mr. Atonga, learned Counsel for the applicant submitted that the 1st respondent moved the Court under Section 90(3) of the Land Act and since the 1st respondent had already exercised its disjunctive right of opting to sue the applicant for recovery of the alleged debt in the suit herein, the intended sale was illegal as it amounted to unjust enrichment of the 1st respondent, thus occasioning double jeopardy on the defendant. Reliance was placed on the case of **Dinesh Kumar Zaverchand Jetha v Guaranty Trust Bank Kenya Limited** [2017] eKLR, as cited in Kajiado High Court Civil Case No. 25 of 2015 **David Karanja Kamau vs Harrison Wambugu Gaita & Kenya Commercial Bank**, where it was held that once a mortgagee exercises the right to sue for a debt he/she/it is prohibited from exercising the statutory power of sale.

11. He further submitted that the applicant had not introduced a new defendant, as Ndutumi Auctioneers who are the bank's agents had been brought in as the 2nd respondent and that due to the existing suit between the 1st respondent and the applicant, there was no need to file an application to introduce Ndutumi Auctioneers as the 2nd respondent in the present application. He submitted that the Notice of Preliminary Objection calls for an explanation of the role of Ndutumi Auctioneers in the suit, which makes the issue not to be a pure point of law. It was submitted that the contention by the 1st respondent was misguided and should be dismissed with costs.

12. Mr. Atonga stated that the 2nd respondent had been instructed by the 1st respondent thus making them the 1st respondent's agents and that if the former is not a party to the suit, the Court would have no one to issue orders against. He relied on the case of **Auto Garage vs Motokov** [1971] EA 314, where it was held that a cause of action is sustained where a party enjoys a right and if that right gets infringed or violated, the innocent party has a remedy available to it in law. He submitted that the applicant has a right not to have his property sold by a mortgagee in exercise of its statutory power of sale due to the existence of the suit herein, but when the 2nd respondent advertised his property for sale, it was in violation of Section 90(3) of the Land Act.

13. It was submitted by the applicant's Counsel that the 1st respondent sought to exercise its statutory power of sale and introduced the 2nd respondent. He further submitted that even if there was misjoinder, the Court can order the enjoinder of a party to assist in bringing a suit to a close in accordance with the provisions of Order 1 Rule 10 of the Civil Procedure Rules, 2010.

14. He also submitted that the inclusion of the 2nd respondent was not fatal to the applicant's case as it would aid and assist the Court to effectively determine the dispute before the Court. He urged this Court to dismiss the 1st respondent's Notice of Preliminary Objection with costs to the applicant.

ANALYSIS AND DETERMINATION.

15. I have considered the Preliminary Objection, the written submissions together with the oral arguments made by Counsel in this matter.

The issue for determination is whether the Preliminary Objection dated 28th January, 2021 is merited.

16. The issue of what constitutes a Preliminary Objection was determined in the case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors** [1969] EA 696, where the Court held as hereunder:

"... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

17. The 1st respondent stated that the orders sought in the application dated 15th January, 2021 are directed against an entity which is not a party in the suit and that the said application introduces a new cause of action, for those reasons, the application should be struck out with costs. The introduction of the 2nd respondent without leave of Court as required under Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 is therefore the bone of contention. The defendant on the other hand maintained that Ndutumi Auctioneers was introduced as the 2nd respondent and not a defendant because if they had not been introduced in the present application, then the Court orders would have been issued in vain.

18. It is this court's view that the Preliminary Objection raises factual issues that require to be ascertained through evidence in regard to the role which was played by the 2nd respondent in the main suit. It would require this court to call for proof to verify whether or not 2nd respondent has a valid stake and/or interest in the proceedings herein and whether it shall be affected in any way by this Court's decision. I am guided by the decision in the case of **Oraro v Mbaja [2005]1KLR 141**, where it was held that:

"any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed."

19. Even supposing that this Court was to take the subject of misjoinder as a pure point of law, **Order 1 Rule 9 of the Civil Procedure Rules 2010** makes it clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. It provides as follows-

"No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

20. Further, Order 1 Rule 10(2) of the Civil Procedure Rules provides that-

"The court may at any stage of the proceedings, either upon or without the application of either party, 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." (emphasis added).

21. This court's finding is that the assertion that the present application raises a fresh cause of action is misleading since the subject matter of the substantive suit and the application herein are legal charges registered over the applicant's properties, namely, Kwale/Shimoni Adj/590, Kwale/Shimoni Adj/671 and Kwale/Vanga/23, for credit facilities advanced to the applicant. It is claimed that the applicant defaulted in his repayments and the 1st respondent exercised its remedies as provided for under Section 90(3) of the Land Act by having the said properties advertised for sale and also by filing the main suit herein.

22. In light of the foregoing, it is evident that the applicant's application does not raise a fresh cause of action distinct from the issues raised in the substantive suit.

23. The Preliminary Objection is therefore devoid of merit and the same is dismissed with costs to the defendant/applicant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 21ST DAY OF MAY, 2021. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM DUE TO THE OUTBREAK OF THE COVID-19 PANDEMIC.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Mutua holding brief for Ms Ngui for the plaintiff/1st respondent

Mr. Atonga for the defendant/applicant

