



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NUMBER 151 OF 2019

MARY NJERI GAKUNGA1ST PLAINTIFF

BRIAN NDUNGU GAKUNGA2ND PLAINTIFF

JENNIFER CAROLINE GAKUNGA3RD PLAINTIFF

VERSUS

MIDDLE EAST BANK KENYADEFENDANT

RULING

1. Before Court are 2 applications lodged by the defendant and dated 9/3/2020, respectively. The first Motion was brought under **Order 2 rule 15 of the Civil Procedure Rules**. It sought to have parts of the plaint that relate to land, the validity of the subject Charge and/or the validity of the Statutory Notices served by the defendant, dismissed and the interim injunction made on 5/11/2019 be set aside.

2. The grounds upon which the said application was made were that this Court lacked jurisdiction to entertain matters relating to land, the validity of a charge, statutory notices served thereon and/or to issue interim injunctions stopping the defendant from exercising its power of sale over charged property.

3. On considering the application, the Court found the same to be frivolous and vexatious. Firstly, the defendant had raised the issue of jurisdiction in its grounds of opposition dated 19/7/2019 which had been filed in opposition to the plaintiff's application for injunction dated 4/7/2019. That application had sought an interlocutory injunction.

4. The Court delivered its ruling on that application on 5/11/2019 and granted the injunction sought. Vide **Explanation 5 of section 7 of the Civil Procedure Act**, the issue of jurisdiction was therefore *res judicata*. **Explanation 5 aforesaid** provides: -

“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.”

5. The defendant having raised the issue as aforesaid, it cannot purport to raise it again before this Court.

6. The second reason why that application cannot lie is that, contemporaneous with the filing of that Motion, the defendant lodged a Chamber Summons seeking production of accounts. One cannot approbate and reprobate at the same time. By its own act of lodging the said application, the defendant had admitted that this Court had jurisdiction to entertain the matter.

7. Finally, this suit arises out of a dispute relating to a loan facility afforded to the late **Aloysius Ndungu Gakunga** by the defendant. The main issues in contention, as stated in the ruling of 5/11/2019, is what is the exact amount due and whether or not the property known as **L.R.No. 10871/2 Muthuri** was given as security for the said facility. It is purely a contractual issue.

8. Accordingly, the Court has jurisdiction and the application is dismissed with costs.

9. The second application was a Chamber Summons dated 9/3/2020. It was brought pursuant to **Order 20, Rule 1 of the Civil Procedure Rules**. In the Summons, the defendant sought orders for proper accounts to be taken to ascertain the amount owed by the plaintiffs, as the personal representatives of the deceased.

10. The order for accounts had been made by Kasango J. The parties informed the Court that the same had been filed. In the premises, the

application has been overtaken by events. Let the parties deal with the accounts that have been filed at the trial.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 24th day of June, 2021.

A. MABEYA, FCI Arb

JUDGE