



**Patel v The Kingdom Bank Limited & 2 others (Commercial Civil Case E088 of 2021)
[2021] KEHC 394 (KLR) (Commercial and Tax) (16 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 394 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE E088 OF 2021
A MABEYA, J
DECEMBER 16, 2021**

BETWEEN

PURBAI GOPAL RAMJI PATEL APPLICANT

AND

THE KINGDOM BANK LIMITED 1ST RESPONDENT

**ROBERT WAWERU MAINA T/A ANTIQUE AUCTIONS
AGENCIES 2ND RESPONDENT**

**NJOROGE REGERU T/A NJOROGE REGERU & CO
ADVOCATES 3RD RESPONDENT**

RULING

1. Before court is the plaintiff's Notice of Motion dated 11/2/2021. The 1st defendant filed a Notice of Preliminary Objection dated 15/2/2021 against the said Motion. The Court directed that both be determined together
2. The Motion seeks a temporary injunction to restrain the defendants from auctioning, selling, disposing, transferring, alienating, damaging, wasting, dealing, trespassing on or interfering in any way whatsoever with all that property known as LR No. 209/45/6 (IR No. 21274) situated on 5th Parklands Avenue, (hereinafter "the suit property") pending the hearing and determination of the suit.
3. The application is supported by the plaintiff's affidavit sworn on even date, her supplementary affidavit and an affidavit in reply sworn by Patrick Lubanga Mutuli, advocate on 16/4/2021, respectively. The 1st defendant opposed the application vide the Notice of preliminary objection dated 15/2/2021 and a replying affidavit sworn on 6/4/2021 by Jackson Kimathi. The 3rd defendant responded through two



replying affidavits sworn by its managing partner Njoroge Regeeru and David Kabeberi on 26/2/2021 and 10/5/2021 respectively.

4. The plaintiff is the widow and administratrix of the Estate of the late Gopal Ramji Ladha Patel who is the registered owner of the suit property. Her deceased husband charged the suit property to City Finance Bank Limited on 31/3/1998 to guarantee financial facilities advanced to Kuza Farms & Allied Limited (“the Borrower”). By a Deed of Assignment dated 27/3/2008, City Finance Bank Limited assigned to Asset Recovery Company Limited (ARC) the non-performing loans in its books which included the loan advanced to the borrower. Thereafter, City Finance Bank Limited was succeeded in title by Jamii Bora Bank Limited who in turn was succeeded in title by the 1st defendant herein.
5. The crux of the plaintiff’s case is that the Estate of the deceased is not indebted in any way to the 1st defendant and that the exercise of statutory power of sale by the 1st defendant is not anchored on any debt or liability by the Estate reflected in its books of accounts. She contends that upon the assignment of the debt to ARC, it acquired absolute ownership of the debt and is therefore the right entity to enforce its payment if at all.
6. She further contends that the Charge which remained with City Finance Bank Limited after assignment of the debt to ARC, was constructively discharged. That in any event, the Auctioneer’s Notification for Sale dated 10/12/2020 is defective, void and inconsequential as it was issued on the same day as the 45 days Redemption Notice. In her view, the exercise of the statutory power of sale by the 1st defendant is but a fraudulent scheme by the defendants to defraud her of the suit property.

The Preliminary Objection

7. The 1st defendant’s preliminary objection is based on the following grounds:
 1. “THAT the Plaintiff’s Notice of Motion Application dated 11th February 2021 is res judicata by virtue of the provisions of Section 7 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya for reasons that the matters directly and substantially in issue therein were directly and substantially in issue in Nairobi HCCC No. 807 of 1999: Gopal Ramji Ladha Patel vs City Finance Bank Limited in which such issues were heard and finally determined by the Judgment and Decree of Hon. Gacheche J. W. of 20th January 2003.
 2. THAT the Plaintiff’s Notice of Motion Application dated 11th February 2021 is res judicata by virtue of the provisions of section 7 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya for reasons that the matters directly and substantially in issue therein were directly and substantially in issue in the Chamber Summons Application dated 24th April 2017 in Milimani HCCC No. 352 of 2009: Purbai Gopal Ramji Patel v Asset Recovery Limited, Joseph Mungai Gikonyo t/a Garam Investments and Jamii Bora Bank Limited in which such issues were heard and finally determined by the Ruling and Order of Hon. Justice F. Ochieng’ of 29th November 2017.
 3. THAT this Honourable Court is statute barred from hearing and/or determining the Plaintiff’s Notice of Motion Application dated 11th February 2021 by virtue of the provisions of Section 6 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya for reasons that the matters directly and substantially in issue therein are directly and substantially in issue in Milimani HCCC No. 352 of 2009: Purbai Gopal Ramji Patel v Asset Recovery Limited and Joseph Mungai Gikonyo t/a Garam Investments which is pending before this Honourable Court for determination”.



8. Expounding on ground 1, the 1st defendant contends that the late Gopal filed Nairobi HCCC No. 807 of 1999 to challenge its predecessor, City Finance Bank Limited's attempt to exercise its statutory power of sale over the suit property and contest the validity of the attendant Charge instrument. The suit was heard and determined by a judgment delivered by Hon. Gacheche J. W. on 20/1/2003 whereby the suit was dismissed and the attendant charge instrument found to be valid. Dissatisfied with the said decision, the deceased preferred an appeal being *Nairobi Court of Appeal Civil Appeal No. 156 of 2003 Gopal Ramji Ladha Patel v City Finance Bank Limited* which appeal was declared to have abated by a Ruling delivered on 11/7/2008. In view thereof, the result of the abatement was that the appeal against the judgment in Nairobi HCCC No. 807 of 1999 was effectively determined in favour of the 1st defendant and became binding.
9. On grounds 2 and 3, the 1st defendant contends that the plaintiff filed a Notice of Motion dated 24/4/2017 in Nairobi HCCC No. 352 of 2009 wherein she challenged its predecessor, Jamii Bora Bank Limited's exercise of statutory power of sale over the suit property. This on various grounds including that she had not been served with a valid redemption notice and/or notification of sale contemplated under Rule 15 of the Auctioneers Rules, 1997; that there was in force an order of injunction restraining the aforesaid exercise of statutory power of sale pending the full determination of the suit; and that Jamii Bora Bank could not purport to exercise its power of sale under the aforesaid Charge instrument because the bank had previously assigned the debt thereunder to ARC.
10. The 1st defendant contends that the said application was heard and dismissed in a ruling delivered on 29/11/2017 by Ochieng J. That in the ruling, the court held that: there was no order of injunction in force restraining Jamii Bora Bank's intended exercise of statutory power of sale under the Charge; the Estate of the late Gopal Ramji Ladha Patel owed the Bank a tidy sum of money; it would be inequitable to grant an injunction to stop the Bank from exercising its statutory power of sale under the Charge in the circumstances when the plaintiff had not shown the Court that she had been servicing the debt; and, that the Bank could proceed to exercise its power of sale under the Charge after issuing all the requisite notices.
11. In support of grounds 2 and 3 of the preliminary objection, the 3rd defendant, who represented ARC and Jamii Bora Bank in Nairobi HCCC No. 352 of 2009, contends that the issue of the whether the plaintiff is indebted to the 1st defendant's is res judicata in view of Justice Ochieng's reiteration of the findings of the Court of Appeal in *Civil Appeal No. 185 of 2010: Purbai Gobal Ramji Patel vs Asset Recovery Services Limited & Another* that the Estate of the deceased still owed the bank a tidy sum of money. Further, the 3rd defendant contends that despite the plaintiff having been granted leave to join Jamii Bora Bank to Nairobi HCCC No. 352 of 2009, she failed to articulate her claim against the bank and withdrew the suit against it.
12. The 3rd defendant contends further that institution of multiple suits over the same subject matter and by same parties (or parties claiming under them) is barred by the doctrine of res judicata since it is intended that the parties plead their case(s) in entirety and not in piece meal. That the existence of the debt owing to City Finance and its successors as well as the party entitled to recover the same is in issue in HCCC No. 352 of 2009 which is still pending before this Court and the plaintiff is not barred from amending her pleadings to enjoin the 1st defendant to the said suit for determination of the issues raised herein.
13. In answer to the objection, the plaintiff contends that the present cause of action arises from the purported exercise of statutory power of sale by the 1st defendant pursuant to a Notice dated 13/10/2020 issued by the 3rd defendant, the 45 days Redemption Notice and Notification of Sale issued by the 2nd defendant on 10/12/2020 and the advertisement in the Daily Nation newspaper of



1/2/2021. She states that these are new set of facts or circumstances which have never been the subject of any litigation before this Court or any other court of law.

14. It is submitted on behalf of the Plaintiff that the doctrine of res judicata is not applicable. That the present suit substantially seeks to determine whether the 1st defendant can seek to enforce its statutory power of sale pursuant to a Charge that does not secure any loan facility in its books; the effect of legal assignment of debts; and whether a Chargee can exercise its statutory power of sale to recover a debt purportedly owed to a third party.
15. She further submits that to the contrary, Nairobi HCCC No. 807 of 1999 only challenged the validity of the Charge instrument. That the Chargor had moved the court for a declaration that the Charge created over the suit property was done without his consent and that it was illegal and incapable of being enforced as it was forged and fraudulently made by the bank's officers and/or agents.
16. It is further submitted that the parties in the present suit are very different from those in Milimani HCCC No. 352 of 2009. The said suit had been instituted against ARC, a different legal entity from the 1st defendant, for purporting to sell the suit property in exercise of a non-existent statutory power of sale. That ARC had sought to recover the debt pursuant to the Deed of Assignment whilst in the present suit, the 1st defendant is seeking to recover the debt pursuant to the Charge instrument. Finally, she urges that the statement by the Court of Appeal in Civil Appeal No. 185 of 2010 that the Estate of the deceased is still indebted to the bank in quite a tidy sum of money was just an obiter dictum and should be interpreted as such since it was not a finding of fact.
17. On her application, it is submitted that the plaintiff has demonstrated a prima facie case with a probability of success by showing that, the 1st defendant has no locus standi to exercise statutory power of sale over the suit property on a debt owed to a third party. That the 1st defendant has failed to provide any material evidence with respect to the loan account details of the borrower and further faults the 3rd defendant for failing to produce any evidence that there was a variation of the Deed of Assignment through which ARC agreed to reassign the debt back to the bank.
18. It is further submitted that the attendant Charge clearly stipulates that the Chargor shall pay to the Chargee such sums not exceeding the Prescribed Maximum Debt which is defined as the aggregate sum of Kshs 70,000,000/= hence there is no justification for 1st defendant to demand and seek to recover a sum of Kshs 534,446,410.25 through the impending public auction. That a formal search conducted at the land registry reveals that the Charge instrument is not registered and this alone disentitles the 1st defendant from exercising any statutory power of sale.
19. As regards irreparable harm, It is submitted that there will be no reparation sufficient to address the injustice caused through the fraudulent sale of the suit property as damages cannot be sufficient remedy in a supposed criminal act and where indebtedness is denied. On the third limb, it is submitted that the inconvenience which the plaintiff will suffer if the injunction is refused is greater than that which the defendants will suffer if it is granted. She urges that in the event that the defendants are allowed to sell the suit property by public auction, the entire estate of the deceased will be divested of the suit property, deprived of their source of income and reduced to paupers.
20. The 1st and 3rd defendants have both faulted the plaintiff for using the courts to stop public auctions whenever there is an impending realization of the security over the suit property despite knowing fully well that the debt secured by the same has never been paid. The 1st defendant contends that it has complied with the requirements of the law as well as the ruling and Order of 29/11/2017 by Justice Ochieng in Nairobi HCCC No. 352 of 2009. It submits that no irreparable harm would result if the injunction sought is not granted as damages would be a sufficient remedy in the unlikely event that any



fault would be found attributable to it since it is a licensed banking institution of repute with ability to settle such damages.

21. The 3rd defendant on the other hand contends that the suit against him is malicious, without foundation either in law or in fact and is merely intended to derail the realization of the security. He submits that at all material times, he acted as Counsel on the instructions of the 1st defendant and ARC and as such, there is no basis whatsoever for his and/or his law Firm to have been joined in these proceedings.
22. In his view, there is no evidence of the alleged fraud or collusion on his part or any member of his Firm with the 1st defendant's predecessor to defraud the applicant of the suit property as alleged or at all. Lastly, he stated that the notices issued by his Firm dated 23/5/2019 and on 23/10/2020 do not overlap with the notice issued by the 2nd defendant on 10/12/2020 as alleged by the plaintiff.
23. David Kabeberi, a shareholder and the Chairman of ARC, states that; following a finding by the Court of Appeal in Civil Appeal No. 185 of 2010 that ARC did not acquire the special statutory power of sale since what was assigned thereunder was the debt and NOT the Charge over the suit property, ARC withdrew from any further attempts to realize the property and the bank took over the efforts of attempting to recover the long outstanding debt.
24. That ARC and Jamii Bora Bank entered into a Varied Deed of Assignment which removed the subject debt from the list of the assigned debts. It was also his contention that the debt owing from Kuza Farm & Allied Ltd was never written off at any given time hence nothing bars the 1st defendant from taking steps to collect what is due to it or its predecessor.
25. In his submissions, the 3rd defendant argues that the plaintiff has not demonstrated that she meets the conditions necessary for the grant of a temporary injunction. That the plaintiff has not established a prima facie case since she has not demonstrated that there are any rights that shall be infringed if the injunction sought is not granted. He asserts that the plaintiff is not deserving of the equitable relief as she has not to come to Court with clean hands given that she is yet to take any steps to have the suit property discharged.
26. He further submits that the charge was duly registered under the name of City Finance Bank Ltd and the registration of the encumbrance can be found by conducting an official search of the property. He urges the Court to disregard the Affidavit in Reply sworn by Patrick L. Mutuli arguing that it does not reflect the actual state of affairs.
27. Having considered the rival contentions and the submissions of learned counsel, the following are the issues for determination:
 - i) Whether the Plaintiff's application is res judicata?
 - ii) Whether the Plaintiff's application is sub judice?
 - iii) Whether the Plaintiff has satisfied the conditions necessary for granting of the injunction sought?
28. On resjudicata, Section 7 of the Civil Procedure Rules, 2010 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.”

29. I have carefully looked at the plaint dated 24/6/1999 which was filed by the Chargor in Nairobi HCCC No. 807 of 1999 . I have also considered the judgment that was delivered in that suit on 20/1/2003 by Gacheche J. I have also carefully perused the present application and the basis of the order sought.
30. The view I take is that, the matters in issue in the two suits are glaringly different notwithstanding that they relate to the same suit property, same loan facility and same charge instrument. Issues such as the effect of the legal assignment of the debt to ARC; the absence of records relating to the loan facility in the bank; whether a Chargee can exercise statutory power of sale to recover a debt owed to a third party; and collusion to defraud the Estate of the suit property did not arise in the previous suit. What the court determined in that suit was the validity of the Charge instrument which had been challenged on entirely different grounds. To that extent, the Plaintiff’s present application does not offend the provisions of Section 7 of the [Civil Procedure Act](#).
31. I have also carefully considered the application dated 24/4/2017 filed by the plaintiff herein in Milimani HCCC No. 352 of 2009 and the resultant ruling delivered by Ochieng J on 29/11/2017. In that application, the plaintiff sought a temporary injunction to restrain the bank from exercising statutory power of sale over the suit property on several grounds inter alia: that the bank had not served the plaintiff with the relevant notices and that the debt had been assigned to ARC.
32. It is noteworthy that in the earlier ruling, Justice Ochieng did not make any determination on the effect that the assignment of the loan to ARC had on the bank’s quest to realize the security. The court held that the injunctive order sought against the bank was unsustainable mainly because it could not be issued in a vacuum, for the reason that the plaintiff had not amended the Plaint to join the bank in the suit. None of the matters that are directly and substantially in issue in the present application were raised or could be raised then in the application in Milimani HCCC No. 352 of 2009. The two applications are only similar to the extent that they both seek injunctive orders against the bank’s realization of the security. In any case, it is notable that the bank is no longer a party in Milimani HCCC No. 352 of 2009 as the plaintiff withdrew the case against it.
33. In this regard, the Court holds that the Plaintiff’s application does not offend the provisions of section 7 of the [Civil Procedure Act](#) and it is therefore not res judicata.
34. On whether the application is sub-judice, Section 6 of the [Civil Procedure Act](#) sets out the sub judice rule as follows:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
35. There is no doubt that Milimani HCCC No. 352 of 2009 is still pending before this court. It is also not in dispute that the defendants in that suit, are not the same as those in the present suit. More importantly, in that suit, the plaintiff challenges the validity of the Deed of Assignment dated 27/3/2008 and ARC’s attempt to exercise a statutory power of sale under the same.
36. In the present suit, the main issue in contention is whether the 1st defendant can exercise a statutory power of sale under the Charge that remained with it, to recover a debt that it assigned to a third party.



That being the case, the present application cannot be said to offend the provisions of section 6 of the Civil Procedure Act.

37. On whether the plaintiff has satisfied the conditions necessary for granting of injunction, the principles governing the grant of temporary injunctions were laid down in the famous case of *Giella v Cassman Brown & Company Limited [1973] EA 358*. In that case, the court stated as follows:-

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

38. On the first limb, I hold the view that the question as to whether or not the plaintiff has established a prima facie case with probability of success, turns on whether she has demonstrated that the Charge which remained with the bank upon assigning the debt secured by the same to ARC, is a mere shell from which a Chargee’s remedy of statutory power of sale cannot arise.

39. It is common ground that in Civil Appeal No. 185 of 2010, *Purbai Gobal Ramji Patel vs Asset Recovery Services Limited & Another*, the Court of Appeal held that the Deed of Assignment made between the 1st defendant’s predecessor and ARC only assigned the debt and NOT the Charge over the suit property. It is unquestionable that this Court is bound by the said decision as it has not been set aside.

40. The defendants have not produced the alleged Varied Deed of Assignment entered into between ARC and the bank that reassigned the debt back to the bank for recovery. Further and in any case, the bank statement presented before this Court by the 3rd defendant, who is not the bank, relate to a period long before the Deed of Assignment was executed. It is therefore this court’s view that the plaintiff has established a prima facie case with probability of success.

41. This is so because, the debt is being held by ARC. The 1st defendant only holds the charge. No statement of account was produced to show the debt. It is arguable if a charge can secure a debt owed to a 3rd party the court entertains serious doubt to that fact.

42. As regards the second limb, the Court takes the view that the plaintiff stands to suffer irreparable harm which cannot be compensated in damages if the injunction sought is not granted. This is so because the Estate of the deceased will be divested of the suit property by a party who has not established that it has a right over the debt secured by the suit property.

43. Be that as it may, even if damages would be an adequate remedy in these circumstances, seeing that the bank is capable of paying the same when needed to, a temporary injunction would still be necessary in view of the strength of the plaintiff’s case of a threatened violation of her right to the suit property.

44. In *Lucy Waithaka v Industrial and Commercial Development Corporation [2001] eKLR*, Ringera J (as he then was) held:-

“...it is not an inexorable rule that where damages may be an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses. That would not only be unjust but it would also be seen to be unjust.



45. In the present case, the plaintiff is in occupation of the suit property. If she is dispossessed and it is ultimately found that the sale was unwarranted, her condition would never be reinstated. She will thereby suffer loss that is irreparable.
46. On the third limb, it is this Courts view that the balance of convenience tilts in favour of the plaintiff. This is so because she has shown that the inconvenience that she will suffer if an injunction is not granted is far greater than the hardship that will be caused to the 1st defendant if the injunction is allowed.
47. In the premises, the Court holds that the plaintiff has made out a case for the grant of a temporary injunction pending the hearing and determination of the suit.
48. In view of the foregoing, the 1st defendant's Notice of Preliminary Objection dated 15/2/2021 lacks merit and is hereby dismissed with costs. The Plaintiff's application dated 11/2/2021 is meritorious and is hereby allowed as prayed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2021.

A. MABEYA, FCI Arb

JUDGE

