



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC NO. 90 OF 2019

YVONNE CELIA ADHIAMBO RAREIYA

PAUL BRIAN OHULA RARIEYA (suing on behalf of the late

TABITHA OBALA OGUTU.....PLAINTIFF

VERSUS

OLOO ONYANGO ELLY T/A

EPIC AVIATION COLLEGE.....1ST DEFENDANT

KENYA WOMEN MICROFINANCE BANK LTD.2ND DEFENDANT

GEOFFREY O. MULANYA T/A

MULANYA & MAONDO ADVOCATES.....3RD DEFENDANT

RULING

1. The Notice of Motion dated 20th December 2019 has two main prayers:-

3. That this Honourable Court be pleased to grant leave to the plaintiff to amend his Plaint in terms of the draft Amended Plaint annexed hereto.

4. That upon granting Order 3 above, the Honourable Court be pleased to Order that pending the hearing and determination of the suit herein, an Order of injunction do issue restraining the Defendants whether by themselves, their servants or agents or howsoever otherwise from advertising for sale, selling, disposing of, transferring or in any other way interfering with the title to the property Title Number NAIROBI/BLOCK 72/1149.

2. Prayer 3 is not opposed and is hereby granted.

3. As to the prayer for injunction, Kenya Women Microfinance Bank Ltd (**the Bank**) raised a preliminary objection that the application is res judicata since a similar application dated 25th February 2018 was settled by the Ruling of this Court delivered on 18th October 2019. I think the bank is right.

4. It is common ground, I would think, that the doctrine of res judicata is applicable to main suits as it is for applications. The doctrine is codified in Section 7 of the Civil Procedure Act which reads:-

“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.

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or

not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other. Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—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.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

5. As regards this matter, explanation 4 to the provisions is relevant:-

“Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit”.

6. From the application itself and address to the Court by counsel for the Applicant, it is hinged predominantly on the argument that under the terms of the facility the borrowers and/or the guarantors were to procure a credit life insurance through KWFT Insurance Policy. The policy was to be used to liquidate the loan in case of death or permanent disability of the borrower(s) and/or guarantors. The borrower is dead and the applicant argues that the Bank has failed, refused and/or neglected to call up the life policy and is instead proceeding to sell the suit property.

7. Reacting to a question posed by the Court, counsel for the Bank conceded that the argument was available to the Applicant at the time of bringing a similar application for injunction of 25th February 2019 but indicates that previous counsel failed to take it up on behalf of the Applicant.

8. Looking at the previous application this Court finds the following ground:-

“The letter of offer provides for Insurance to liquidate the loan in the event of the demise of the 1st Respondent or the 2nd Deceased and as such the 1st Respondent should seek to recover any sums owed by the 1st Respondent via the said Insurance”.

9. In the affidavit in support of the application, the Applicant does not press the argument of the Insurance but concentrates on the invalidity of the guarantee contract and charge. In the submissions in support of the application, counsel for the Applicant does not make any argument whatsoever on the Insurance.

10. The Court in dismissing the application found that the Plaintiff had failed to establish a prima facie case with probability of success. I would think that if the Applicant felt that the Ruling did not consider all matters raised then it should have sought to either review the Ruling or appeal it. The solution was not to mount a second application such as this. I would therefore hold that this matter is res judicata the earlier application.

11. Even if I am wrong in my conclusion I would still not grant the prayer. Clause 6.1 of the facility letter reads as follows:-

“The Borrower(s) and/or Guarantor(s) shall procure credit life insurance KWFT Insurance Agency. The premium payable for the policy shall be charged at the rate of 0.3% per annum on the disbursed amount throughout the term of the loan. The costs of the policy shall be at the sole expense of the Borrower(s) and/or Guarantor(s) and shall be payable on a monthly basis”.

12. This Court has not been shown the Credit Life Insurance Policy contemplated under that clause. The clause provides that the Borrower and/or guarantor shall procure a credit Life Insurance. In this matter, the Applicants who are the personal representatives of the Deceased estate, seek to invoke the Insurance Policy on behalf of the Deceased who was the guarantor herein. I would therefore think that so as to succeed in this argument the Applicants ought to have demonstrated that the Deceased had procured the Life Credit Insurance. It does not seem to this Court (and this is a tentative view) that the taking out of the Life Credit Insurance Policy was the mandate of the Bank as argued by counsel for the Applicant. To procure in general parlance means “obtain” and in law to “persuade or cause to do something” or “cause to happen” (see Concise Oxford English Dictionary). It has not been shown to this Court that the Deceased did any of those as regards the policy.

13. In the end I allow prayer (3) but dismiss prayer (4) of the Notice of Motion dated 20th December 2019. Costs in the cause.

Dated, Signed and Delivered in Court at Nairobi this 28th Day of January 2020

F. TUIYOTT

JUDGE

PRESENT:

Mungai for Murage for Plaintiff/Applicant

Reshma for Defendants

Court Assistant: Nixon