



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.181 OF 2019

RASHMIKANT BWAGWANDAS KANABAR.....PLAINTIFF

VERSUS

1. HIGHGROVE HOLDINGS LIMITED.....1ST DEFENDANT

2. I & M BANK LIMITED.....2ND DEFENDANT

RULING

1. Before this Court is the Notice of Motion dated 30th July 2019 by which the Plaintiff/Applicant **RASHMIKANT BHAGWANDAS KANABAR** seeks the following Orders:-

“1. SPENT

2. SPENT

3. THAT pending the hearing and determination of the suit herein an interim injunction order do issue to restrain the 2nd Defendant herein either by itself or its agents and/or servants from interfering, alienating or otherwise howsoever dealing with the House No.19 situated at L.R NO.2998, lower Kabete Road Nairobi.

4. THAT in any event the costs hereof be awarded to the Plaintiff.”

2. The Application was premised upon **Order 40 Rules 1 & 2 of the Civil Procedure Rules, Section 3A Civil Procedure Rules Section 3A Civil Procedure Act Cap 21 laws of Kenya** and all enabling provisions of law. It was supported by the Affidavit of even date sworn by **LEWIS KALIA KYENGO** an Advocate of Court of Kenya.

3. **I & M BANK LIMITED**, the 2nd Defendant (hereinafter “**the Bank**”) opposed the application through the Replying Affidavit dated 31st August 2019, sworn by **ANDREW MUCHINA**, a Legal Manager in the Recoveries Department of the 2nd Defendant Bank. In their Replying Affidavit the Bank raised a Preliminary Objection to the suit. The application was canvassed by way of written submissions. The Plaintiff/Applicant filed his written submissions on 25th September 2019 whilst the 2nd Defendant/Respondent filed its submissions on 9th October 2019.

BACKGROUND

4. The Plaintiff/Applicant is the registered proprietor of **House No.19** within **L.R NO.2998** along lower Kabete Road in Nairobi County, having purchased the same from **HIGHGROVE HOLDINGS LIMITED** (the 1st Defendant/Respondent). The payment of the purchase price for the house was effected by way of a transfer of **Kshs.193,495,000** from **ASL Credit** into the account of the 1st Defendant which transfer was effected between 15th July 2013 to 20th February 2014.

5. The Plaintiff/Applicant fell ill after purchasing the said house and this necessitated his re-location to Australia in pursuit of better medical facilities. The Plaintiff/Applicant claims that while he was away the 2nd Defendant advertised **House No.19** for sale by auction on 30th July 2019 without serving upon the Plaintiff/Applicant the requisite statutory notices of sale or the Redemption notice.

6. It is the Plaintiff/Applicant’s contention that the intended sale was the result of a disagreement between the 1st and 2nd Defendants over reconciliation of the Highgrove Village development accounts which was a joint venture development undertaken between the 1st and 2nd

Defendants and in which the Plaintiff/Applicant had no involvement at all. The Plaintiff/Applicant avers that the intended sale is null and void and illegal given that the suit property had already been transferred to himself. Hence the present application.

7. On its part the 2nd Defendant Bank avers that pursuant to a letter of Offer dated **10th January 2017**, the Bank extended to the 1st Defendant a credit facility. As security for that credit facility to the 1st Defendant, the Plaintiff/Applicant executed a first legal charge dated **4th April 2017** over town **House No.19 Highgrove village** situated on **LR NO.2998**, lower Kabete in favour of the Bank (hereinafter the suit property)

8. The 1st Defendant defaulted in settling the outstanding debt and the Bank issued the 1st Defendant with a demand letter dated **25th July 2017** calling for settlement of the outstanding amount. The Demand letter was also copied to the Plaintiff. Neither responded to the demand letter therefore the Bank issued requisite statutory notices under the Land Act. A redemption notice was also issued to the Plaintiff by way of registered post.

9. A 45 days' Notification of Sale was issued in respect of **L.R 209/4892** (original **4639/8**) and **L.R 29998** (Original **4928/5** and **2951/54**) to the 1st Defendant and the guarantors on **8th February 2018**. After the issuance of the notices, the Bank discovered that **villas No.6,13,14,17,20,25 and 26 of L.R Number 29998** (Original **4928/5** and **2951/54**) had been sold to third parties without the Bank's consent, necessitating issuance of 45 days' notices to the sub lessees of the said villas on **19th July 2019**.

10. The Bank maintains the Plaintiff and the 1st Defendant are truly and justly indebted to the Bank for the sum of **Kshs.1,547,374,147.57** outstanding on the 1st Defendant's account as at **30th June 2019**. It is alleged that the said debt was admitted by the borrower in **HCCC E073 OF 2019 Highgrove Holdings Limited V I&M Bank & Another**.

ANALYSIS AND DETERMINATION

11. I have carefully considered the written submissions filed by both parties in this matter. The following issues arise for determination.

(i) Is the Preliminary Objection dated **31st July 2019** merited?

(ii) Is the Application for injunctive Orders merited?

i. Preliminary Objection

12. The 2nd Defendant Bank filed in Court a Notice of Preliminary Objection dated **31st July 2019** seeking to have the Plaintiff's entire suit struck out "**in limine**" on grounds that:-

"The suit is Res Judicata as the issues raised therein have been conclusively determined by this Honourable Court in HCCC E 073 OF 2019, Highgrove Holdings Ltd –Vs- I & M Bank & Another."

13. Additionally vide their Replying Affidavit dated **31st August 2019**, the 2nd Defendant Bank raised a Preliminary Objection seeking the dismissal of the suit as well as the application dated **30th July 2019** on grounds that:-

"(a) The Supporting Affidavit is fatally defective.

(b) The Verifying Affidavit is fatally defective.

(c) The Application is Res Judicata as the bank's right to exercise its statutory power of sale over the charged property has been determined by a court of competent jurisdiction."

14. For good order this court will deal first with the Preliminary Objection. The definition of what constitutes a Preliminary Objection was set out in the case of **MUKHISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD [1969] EALR 696**, where it was held:-

"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 jurisdiction of the court, or a plea of limitation of a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

15. The 2nd Defendant Bank submits that both the Supporting Affidavit as well as the Verifying Affidavit accompanying the Notice of Motion dated **30th July 2019** are fatally defective as they were sworn not by the Plaintiff/Applicant himself but by the Plaintiff's Advocate acting upon a Power of Attorney granted to him by the Plaintiff/Applicant.

16. It is a general principle in law that an Advocate should not enter into the arena of the dispute between the parties. It is averred for the Bank that Counsel for the Plaintiff/Applicant has in the Supporting Affidavit deposed regarding contentious matters of fact thus making himself a potential witness for cross-examination on a case he is handling which is irregular and is contrary to **Section 9 of the Advocates Practice Rules**.

17. However, it is also a fact that there would be no error where by affidavit of an Advocate raises issues of law and fact which are within his knowledge as an advocate handling the particular suit on behalf of the party on whose behalf he has sworn the affidavit. In **V.K Construction Co. Ltd Vs Mpata Investment Ltd HCC 257 OF 2003** where **Hon. Ringera J** pronounced himself thus:-

“...the jurisdiction to strike out pleadings is to be exercised cautiously and sparingly and only where the cause of action is so obviously bad and almost incontestably bad. For the remedy is a draconian one and where life can be injected in the plaint by an amendment the plaintiff should be given a chance to do so, that further the discretion of the court in such a scenario is unfettered and the learned magistrate should have exercised that discretion in favour of the Plaintiffs/Applicant and failure to revive the suit occasioned a travesty of justice.”[own emphasis]

18. Similarly in **Kamlesh M.A Pattni – VS – Nasir Ibrahim Ali & 2 Others CA 354/2004**, the Court of Appeal in dealing with a serious objection on the admissibility of an affidavit sworn by Senior Counsel **Paul Muite** held inter alia:-

...”There is otherwise no express prohibition against an advocate who, of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client, so too an advocate who cannot readily find his client but has information the sources of which he can disclose and state the grounds for believing the information...”[own emphasis]

19. In this present case the Plaintiff’s Advocate has produced a Power of Attorney dated **24th July 2019** (Annexure “**LKKI**” to the Supplementary Affidavit dated **16th August 2019**). By this Power of Attorney the Plaintiff gave his advocate power to act on his behalf. In the case of **BEN NJUGUNA EIA PROPENSITY PROPERTIES & CONSULTANTS –VS- STANLEY M. GITHUNGURI & Another [2019] eKLR**, the court held that:-

“For a party to authorize another to appear in court over a matter, that party must guarantee the “assignee” legal authority to represent the assignor. In case of an individual, the authority usually takes the form of a power of attorney. A power of attorney is a legal document giving one person, usually (an agent) the power to act for another, (the principal) to make legal decisions on behalf of the principal. The power is usually used when the principal is ill or under a disability or when the principal cannot be present to sign necessary legal documents (usually in financial transactions). In my considered opinion the deponent required at least a power of Attorney to depone to the averments in the Supporting Affidavit. That is lacking herein.”[own emphasis]

20. I therefore find that the Power of Attorney dated **24th July 2019** authorized the Advocate to act for his client who was away in Australia for treatment. Accordingly, I find that the Supporting Affidavit as well as the Verifying Affidavit dated **30th July 2019** are not defective and I dismiss this limit of the Preliminary Objection.

ii. Res-Judicata

21. The 2nd Defendant/Respondent submits that the present application and the entire suit ought to be struck out on grounds that there exists before the High Court another suit being **HCCC E073 OF 2019 Highgrove Holdings Ltd Vs I & M Bank and Another**, in which the Plaintiff/Applicant filed a similar application seeking to injunct the Defendant Bank from exercising its statutory power of sale over the suit property. That vide a Ruling dated **11th July 2019** in **HCCC E073 OF 2019, Hon Lady Justice Wilfrida Okwany**, dismissed the application for an injunction and upheld the right of the Bank to exercise their statutory power of sale over the suit property. A copy of that Ruling is annexed (Pages 1-6) to the Replying Affidavit dated **31st August 2019**.

22. On its part the Plaintiff/Applicant denies that the present suit and application are res judicata. The Applicant submits that the issues raised in the present application are yet to be decided by a court of competent jurisdiction. That the matters arising in **HCCC E073 OF 2019** currently pending before **Hon Lady Justice Okwany** concerned different matters i.e interest payable in repayment of the facility advanced by the Defendant Bank for the development of **House No.3,7 and 19** situated on **LR NO.29998**, whilst in the instant suit the subject matter is the purchase by the Plaintiff of **House No.19** vis-à-vis the developer and the financing Bank.

23. The doctrine of Res judicata is encapsulated in **Section 7** of the **Civil Procedure Act, Cap 21**, laws of Kenya which provides:-

“7. 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 decide by such court.”

24. Vide the application dated **15th May 2019** in **HCCC E073 OF 2019** the Plaintiff/Applicant who is the 1st Defendant in the present suit sought the following orders.

“4. THAT pending the hearing and determination of this application interpartes, this Honourable court be pleased to issue temporary order of injunction against the 1st and 2nd Respondents restraining them from entering, interfere, advertise for sale or sell that property known as House No.19, House No.7 on LR NO.29998 situated at Highgrove Village lower Kabete road in Nairobi County.”

25. In the present the Plaintiff/Applicant seeks for orders:-

“3 THAT pending the hearing and determination of the suit herein an interim injunction order do issue to restrain the 2nd Defendant herein either by itself or its agents and/or servants from interfering, alienating or otherwise howsoever, dealing with the House No.19 situated at LR.NO. 29998 Lower Kabete Road, Nairobi.”

26. It is clearly manifest that in both suits the order being sought are the same to wit an injunction to prevent the advertisement or sale of **House No.19** situated at **LR NO.29998 Lower Kabete**.

27. In **HCCC E037 OF 2019, Hon Justice Okwany** found that the Plaintiff in that case (the 1st Defendant in the present suit) had failed to establish a prima facie case and the Hon Judge dismissed the application for injunctive Orders:-

In the present case the Plaintiff/Applicant claims to have fully paid for the suit property. However, no documentation has been annexed as proof of such payment. On the other hand the 2nd Defendant bank has annexed to its Replying Affidavit dated **31st August 2019** a charge duly executed over the suit property by the Plaintiff/Applicant and the 1st Defendant in favour of the 2nd Defendant Bank.

28. In **JOHN MICHAEL WANJAO VS GEORGE KIMETTO & 2 OTHERS [2014] eKLR**, the Court stated as follows:-

**“I am aware that Section 7 talks of litigation by the same parties. I agree that there are two additional parties to this suit and the parties appear to be different from the previous suit which had only one defendant. However, it is clear that the whole substratum of the case is the registration of the 2nd Defendant as owner of the suit land. I do not think that a party can be allowed to argue that his subsequent case is not res judicata, merely by a mischievous addition of parties. Does it mean that if one sues party X, on a contract which suit is later dismissed, then he can sue party X and Y, in a subsequent suit touching on the same contract, where even party Y was not involved in the contract and yet claim that the suit is not res judicata for the reason that there is an additional party who was not a party in the previous suit? My answer is no, for that would be a cheeky attempt to disguise the latter matter as a different matter, which is clearly not so, and this cannot be permitted as it would avoid the mischief sought to be captured by the doctrine of res judicata. in our instance, I fail to see any cause of action that the Plaintiff has with the 1st Defendant and the 3rd Defendant which can be sustained in the absence of the 2nd Defendant. my own view of this matter therefore is that although the issues being raised appear different, and the parties seem different, those issues could and/or ought to have been a ground of attack in the previous suit, and in my view the addition of the other two parties is a disguise to pass off this suit as a suit raising new issues. There is no new issue which would not have been raised in the former suit. This suit in my view is clearly caught up by the doctrine of “Res Judicata”.
[own emphasis]**

29. Similarly in this case what comes out clear is that although the Plaintiff/Applicant is not a party in **HCCC E073 OF 2019**, the **subject matter** and the **issues** being raised in the two suits are the same. Accordingly, I find that this suit is indeed Res judicata. I further find that it was mischievous and amounts to an abuse of court process for the Plaintiff to file this suit without disclosing to the court that a similar suit is pending before another court of equal and concurrent jurisdiction. Given those circumstances and given the fact that my sister judge had already declined to grant the injunctive orders sought in respect of **House No.19**, I decline to grant the injunctive orders sought by prayer (3) of the present application. To do otherwise would be tantamount to reviewing or sitting on appeal over a decision of a court of concurrent jurisdiction.

30. Finally based on the foregoing I hereby dismiss in its entirety the Application dated **30th July 2019** with costs to the 2nd Defendant/Respondent. The instant suit is transferred to High Court **Number 38** to be mentioned before **Justice Okwany** for further directions.

Dated in Nairobi this 12th day of June 2020

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Justice Maureen A. Odera