REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 27 OF 2013

HASMUKHLAL VIRCHAND SHAH & ANOTHER.....PLAINTIFFS

- VERSUS –

INVESTMENT & MORTGAGES BANK LIMITED.....DEFENDANT

RULING

1. The virus of **COVID-19** was declared by the World Health Organization (WHO) as world pandemic on **11th March 2020**. The first case of COVID 19 was reported in Kenya on **15th March 2020.** On that date the National Council for the Administration of Justice released a press statement suspending, with immediate effect, all court appearance. Parties were only permitted to file their urgent matter by email addressed to the Deputy Registrar of the respective court. Members of staff were directed to be on duty but no member of public was to be permitted to access the court precinct. During that time of scaled down of court processes the Notice of Motion application dated 18th March 2020 was filed by the plaintiffs in this case.

2. That application was presented before me on a skeleton file on 19th March 2020. This was because the original file could not be traced by the few members of staff on duty. On considering the application, without the background of the original file, the plaintiffs were granted on that date *ex parte* interim injunction, restraining the defendant Bank from selling property **MOMBASA/BLOCK/XXVI/380** (the suit property) in exercise of that Bank's statutory power of sale.

3. The application was heard inter partes on 25th June 2020. The main thrust of the defendant Bank's opposition to the application is that the same offends section 7 of the Civil Procedure Act Cap 21.

4. The application is supported by the affidavit of **Sunil Chandulal Shah** (Sunil). There is no explanation of the relationship between Sunil and the plaintiffs. Sunil describes himself as an applicant in this matter. His affidavit dated 18th March 2020 in support of the application is reproduced hereunder:

> ***SUPPORTING AFFIDAVIT***
>
> *I SUNIL CHANDULAL SHAH a male adult of sound mind and of post office box number 80952-80100 Mombasa do hereby MAKE OATH and STATE as follows:*
>
> *(1) THAT I am the Applicant herein sufficiently familiar with the facts of this case and as such I am competent to swear this affidavit.*
>
> *(2) THAT I am informed by my Advocates, ODERA OBAR & CO. ADVOCATES which information I verily believe to be true, that this matter had been certified ready and fixed for hearing of the main suit on the 17th day of March 2020.*
>
> *(3) THAT regrettably, the matter has been taken out of the hearing list of the said date following the directive issued by the Hon the Chief Justice on the closure of the court as one of the measures taken to contain the spread of the COVID 19.*
>
> *(4) THAT meanwhile the Plaintiffs are apprehensive and genuinely so that the Defendant may proceed to advertise for sale and or sell the suit property in exercise of its statutory power of sale*
>
> *(5) THAT the central plank of the plaintiffs' case challenges the legality of the threatened sale, accordingly, the threatened sale of*

the suit property would clearly render nugatory the suit.

(6) THAT there is a real danger that the suit property shall be sold and transferred thereby rendering the instant suit academic.

(7) THAT similarly, the sale of the suit property, the only known home for the plaintiffs and their family members most of whom are the advanced age will render the plaintiffs and their families homeless. Seen in that light, I verily believe that the sale of the suit property is not the equitable option for the defendant in the circumstances.

5. The affidavit in opposition to the application was sworn by **Andrew K. Muchina** the manager in the defendant Bank's legal department. That deponent set out in detail the various loan facilities extended to a company known as Virchand Virpal & Sons Limited (the company). Those facilities were secured by, amongst others, by first charge dated 24th September 1992 over the suit property. There was a further legal charge dated 10th January 1996, a second further charge dated 25th May 1998 and a third further charge dated 29th January 2009 over the suit property. There was default in the repayment of the various facilities advanced to the company which despite the plaintiffs' undertaking to regularise repayments they failed to do so. Due to continued default the defendant Bank decided to exercise its right to sell shares pledges as security by the plaintiffs. Following that sale the plaintiffs filed case **HCCC 259 of 2010**. In that case the plaintiff obtained ex parte injunction restraining the Bank from exercise of its statutory power of sale over the suit property. On the hearing inter partes of injunction application the court by its Ruling of **3rd June 2011** dismissed the application. Thereafter when the Bank again issued demand to the plaintiffs on **19th December 2011**, the plaintiff yet again filed a Notice of Motion application dated **18th May 2012**. By it they were seeking to restrain the Bank's sale of the suit property. The plaintiffs relied in regard to that injunction application on the ground that the Third Further charge dated 13th September 2009 did not contain a repayment date. That application was dismissed by the Ruling dated **28th June 2012**. The plaintiffs filed an appeal against that dismissal, in **Civil Application No. NAI 191 of 2012**. That application was dismissed by the court of appeal on **21st December 2012**. When the Bank was poised to auction the suit property in exercise of its statutory power of sale on 6th December 2012, the plaintiffs filed this very case and simultaneously filed a Notice of Motion application dated **29th January 2013**. This suit is based on the allegation that the suit property was a matrimonial property. By a Ruling of **24th April 2014** that application was dismissed. On the plaintiffs filing an appeal against that dismissal, in **Civil Appeal No. 243 of 2015** that appeal was dismissed on **23rd November 2018**. On the plaintiffs seeking leave of the court of appeal to file an appeal to the Supreme Court that application was declined. That dismissal of the appeal discharged the injunctions, in this case, restraining the Bank from auctioning the suit property.

6. The plaintiff yet again filed a case in Mombasa High Court being **HCC No 6 of 2019** seeking to restrain the Bank from exercising its statutory power of sale over the suit property. By a Ruling of **12th March 2020** the Mombasa High Court dismissed the injunction application and also the whole suit while upholding the Banks preliminary objection that they were *res judicata*. It is on the basis of the above narration that the Bank stated that the plaintiffs' present application offends **Section 7 of Cap 21**. The Bank contended that its exercise of statutory power of sale was lawful and valid and that the plaintiffs have no basis to seek to restrain the Bank.

ANALYSIS AND DETERMINATION

7. Section 7 of Cap 21 forbids the filing of a matter directly or substantially in issue in the former suit which issue has been heard and finally decided. Section 7 of the Civil Procedure Act 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 decided by court."

8. *Res judicata*, meaning a matter decided, was discussed in the case **Julius Muthoka Ndolo v Park Towers Limited & 2 Others [2019] eKLR** where it was stated:

"This doctrine has been applied in a number of cases including*; *Reference No.1 of 2007, James Katabazi and 21 Others vs The Attorney General of the Republic of Uganda EACJ where the Court stated that for the doctrine to apply:

(a) the matter must be 'directly and substantially' in issue in the two suits,

(b) the parties must be the same or parties under whom any of them claim, litigating under the same title; and

(c) the matter must have been finally decided in the previous suit."

See also the ***Uhuru Highway Development Limited case (supra).***

9. Further in the case **George Kamau Kimani & 4 Others v The County Government of TransNzoia & another [2016] eKLR** on that doctrine stated:

*"16. In **Trade Bank Limited V L Z Engineering Construction Limited [2001] E.A.266,** this Court, adopting the definition of issue estoppel in **Halsbury's Laws of England** (4th edition) at page 861 stated:*

"An estoppel which has come to be known as Issue Estoppel may arise where a plea of res-judicata could not be established because the causes of action are not the same. A party is precluded from contending the contrary of any precise point which having once already been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the

objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue on the first action, provided it is embodied in a judicial decision is final, is conclusive in a second action between the same parties and their privies. The principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law".

17. The principle of res judicata is intended to bring finality in litigation. The learned authors of ***MULLA, Code*** *of* ***Civil Procedure,*** *18th edition [2012] at page 293 states as follows:*

"The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a judgment becomes conclusive, the matters in issue covered thereby cannot be re-opened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly or at a later stage. The principle is rooted to the rationale that issues decided may not be re-opened and has little to do with the merit of the decision".

10. The doctrine of res judicata, as can be seen from the above cases forbids the re-hearing of a suit or issue in a subsequent suit which issue had been heard and finally decided. The plaintiffs did not deny the history of the court action between them and the defendant as set out above. Having accepted that indeed they had previously presented injunctive application relating to the Bank's exercise of its statutory power of sale it is not easily understood how the plaintiffs expected to escape the provisions of Section 7 of Cap 21which state that they cannot relitigate the same issue, yet again. The plaintiffs have gone from the High Court to the Court of Appeal on the same issue of the charge instrument not having a clause on the maximum payment and on the issue that the suit property is a matrimonial property.

11. In case the plaintiffs entertained a notion that res judicata does not apply to applications let me dissuade them of that notion by relying on the case **Njue Njagi v Ephantus Njiru Ngai & another (2016) eKLR** thus:

"..there must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that section 89 of our Civil Procedure Act caters for.

The word "suit" is defined in section 2 of our Civil Procedure Act as:

"Means all civil proceedings commenced in a any manner prescribed."

Also the word "prescribed" has been defined to mean "prescribed by rules" and "rules" are defined to mean "rules and forms made by the Rules Committee to regulate the procedure of the courts". What stands out as most important here is that section 89 of our Civil Procedure Act makes it mandatory to follow the procedure provided in the Act makes it mandatory to follow the procedure provided in the Act(sic)***to all proceedings in any Court of Civil jurisdiction. That can only mean that interlocutory proceedings come within the purview of the word "suit" for the purpose of the issue of res judicata by virtue of section 89 of our Civil Procedure Act"…….. "We have no hesitation whatsoever in saying that the general principles of res judicata cannot be limited by section 7 of the Civil Procedure Act and that the section (Section 7) is not exhaustive."*** (Emphasis added)

12. The plaintiffs need to bear in mind that they are bound by the findings and Rulings of this court and the court of appeal. And this is so even if now they wish to argue that the doctrine of *lis pendens* applies or that the plaintiffs are aged and the suit property is the only property they have.

13. I began this Ruling by setting out the back ground in which the application for injunction was issued because it is clear that the plaintiff may have taken advantage of the prevailing circumstances under which the Judiciary was operating because of the COVID-19 pandemic. As stated before there was by then only a small number of staff available at the court registry which may explain why the main file in this matter was not availed to me as I considered the plaintiffs' application. That notwithstanding the plaintiffs bore a responsibility, as all parties approaching the court *ex parte* for equitable relief bear. The plaintiffs were obligated to put all the information pertaining to the matter before the court. The plaintiff should have had before court all the previous applications they had filed and should have disclosed their outcome. They did not. They did not act with utmost good faith. It was not enough, after *ex parte* injunction had been issued, which thwarted the scheduled auction, for the plaintiff to disclose that its previous injunctions had failed. This disclosure should have been done at the very initial stage when they approached this court *ex parte* The plaintiff would be advised to always bear in mind what was stated in the case **Davis Mwalimo Mwangeka v Kenya Port Authority & Another (2015) eKLR** thus:

"*Orders of injunction are equitable in nature. Accordingly the maxim that, he who comes to equity must come with clean hands applies to the Plaintiff. Does he have clean hands? The answer to that cannot be determined in the absence of the Police being asked to confirm their relationship with the Plaintiff.*

I need further to say that when a party appears before Court for ex parte injunction order, as the Plaintiff has done now at least three times, there is an obligation on such a party to do so with utmost good faith (uberrima fide). Such a party should be candid. That is the gist of the following decisions-

"In the case of Mobile Kitale Service Station –Vs- Mobil Oil Kenya Limited & another (2004)eKLR the Hon. Justice Warsame held-

'An interlocutory injunction is given on the Court's understanding that the defendant is trampling on the rights of the Plaintiff. An interlocutory injunction, being an equitable remedy, would be taken away (discharged) where is shown that the

person's conduct with respect to matters pertinent to the suit does not meet the approval of the Court which granted the orders which is the subject matter.

The orders of injunction cannot be used to intimidate and oppress another party. It is a weapon only meant for a specific purpose – to shield the party against violation of his rights or threatened violation of the legal rights of the person seeking it."

UHURU HIGHWAY DEVELOPMENT LIMITED –Vs- CENTRAL BANK OF KENYA & OTHERS CIVIL APPLICATION NO. 140 OF 1995 where the Judges of Court of Appeal had the following to say-

'…. Order 39 Rule 3(1) of the Civil Procedure (revised) Rules (now Order 40 of the civil Procedure Rules, 2010) permits the granting of ex parte injunctions but it must clearly be understood that a party who goes to a judge in the absence of the other side assumes a heavy burden and must put before the Judge all the relevant materials, including even material which is against his interest. The basis for this requirement is obvious; it is a universal rule of natural justice that Court orders ought to be made only after hearing or giving all the parties an opportunity to be heard. Ex parte orders, whether they be injunctions or whatever, form an exception to this rule and for a party to benefit from the exemption, there must be a good and compelling reason for it.

…. I would add my voice to that of my learned brothers that there cannot be any legal authority for obtaining an ex parte injunction on one basis, and when it comes to the inter partes hearing of the application, a totally different or even a more detained basis is advanced to support the ex parte order. A party who has obtained an ex parte order must be able to support that order, at the inter parties hearing, on the very same grounds upon which he was able to obtain it in the first place. I would also agree that the granting of ex parte injunctions should be the exception rather than the rule. Ole Keiwua, J found as a fact that the applicant obtained the ex parte order of injunction by concealing from Githinji, J relevant material which it could have been in a position to disclose to the later learned Judge."

14. The application dated 18th March 2020 for the reasons set out above fails and is dismissed with costs.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **10th** day of **AUGUST** 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Plaintiffs:

For the Defendant:

ORDER

This decision is hereby virtually delivered this **10th** day of **August, 2020.**

MARY KASANGO

JUDGE