



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NO.672 OF 2006

NANCY ELIZA MUTHONI GIKONYO.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA.....1ST DEFENDANT

RUPINDER SINGH SEHMI.....2ND DEFENDANT

LIFELINE TRADERS.....3RD DEFENDANT

RULING

1. Before this Court is the Preliminary Objection dated **14th December 2018**. The Plaintiff/Applicant had earlier filed the Notice of Motion dated **5th December 2018** seeking inter alia an order:

“THAT, an order to issue preserving the suit property thereby restraining the 2nd Defendant/Respondent either by himself or through his agents, servants and/or representatives or any other person or entity from transferring or in any other way disposing off the suit property and/or interfering in any manner with the suit property pending the hearing and determination of the main suit.”

2. Before the application could be heard and determined the 2nd Defendant/Respondent being **RUPINDER SINGH SEHMI** and **LIFELINE TRADERS LIMITED** the 3rd Defendant (Auctioneer) filed in Court the Preliminary Objection dated **14th December 2018** which objection was premised on the following grounds:-

1. The Applicant’s Application dated 5th December, 2018 is *res-judicata* and contrary to the express provisions of Section 7 of the Civil Procedure Act, Cap 21, laws of Kenya.

2. The Honourable Court is *functus officio* having delivered its Ruling on 22nd September, 2017 on the same issues raised in a similar Application dated 18th July, 2016 by the Applicant.

3. The Applicant is estopped by the doctrine of estoppel from rearguing the Application.

4. The applicant is by her present Application asking the Honourable Court to sit on its own appeal of its own decision.

5. There are no new and important issues for determination before this Court.

6. In view of the foregoing the Applicant’s Application dated 5th December 2018 is hopelessly misconceived, frivolous, totally devoid of merit, bad in law and abuse of Court process and should be struck out.

3. The Plaintiff filed a Reply to the Preliminary Objection supported by the Affidavit of the Plaintiff **NANCY ELIZA MUTHONI GIKONYO** dated **21st January 2019**. Pursuant to directions of the court the Preliminary Objection was canvassed by way of written submissions. The Respondents filed their written submissions on **6th February 2019** whilst the Applicant filed her written submissions on **18th February 2019**.

BACKGROUND

4. Sometime in the year **1995** one **Mr. Kuria Gikonyo** who was the husband to the Plaintiff/Applicant took a loan facility in the amount of **Kshs.3,000,000** with **HOUSING FINANCE COMPANY OF KENYA LIMITED** (the 1st Defendant/ Respondent). The said **Mr Gikonyo** offered as security for the loan the property known as **LR NO.7785/311 Runda** (hereinafter referred to as “**the suit property**”). As a result the charge dated **22nd August 1995** was registered on **12th September 1995**.

5. Under the Charge instrument repayments were to be made by monthly installments of **Kshs.66,398/=** for a period of 15 years. In the beginning the repayments were made as required but at some point the Plaintiff’s husband defaulted and on **28th January 2004** the Bank issued him with a statutory notice. The default continued and the Bank proceeded to advertise the property for sale by a Public Auction. On or about **24th April 2007** the 2nd Respondent purchased the property by private treaty for the sum of **Kshs.18,000,000/=** vide a Sale Agreement dated **9th June 2007**. Thereafter by way of a transfer dated **19th July 2007** the suit property was transferred to the 2nd Respondent. That transfer was duly registered on **25th July 2007** in favour of the 2nd Defendant as bonafide purchaser.

6. Upon conclusion of transfer of the suit property to the 2nd Defendant, the mortgage balance due to the bank was offset and the excess being the sum of **Kshs.11,882,514.30** was forwarded to the Plaintiff’s husband, receipt of which sum was properly acknowledged. Thereupon the 2nd Defendant instructed the 3rd Defendant to secure vacant possession of the property by evicting the Plaintiff’s family therefrom. The eviction took place in **January 2008**. At this point the Plaintiff’s husband went missing and apparently has not been traced to date. The Plaintiff obtained leave to take over the suit and represent her husband in the matter. The 2nd Defendant therefore acquired possession of the suit property in the year 2007. All the above facts are uncontroverted.

7. The 2nd Defendant thereafter proceeded to obtain a loan facility from **STANDARD CHARTERED BANK** and upon falling into arrears Standard Bank in exercise of its statutory right of sale sold the suit property to a third party. The Plaintiff has now come to court seeking to prevent the transfer of the suit property to this third party pending the hearing and determination of the suit. Before the Notice of Motion of **14th December 2018** could be heard the Defendants filed this Preliminary Objection.

ANALYSIS and DETERMINATION

8. The Preliminary Objection is premised on the grounds that the application dated **14th December 2018** is “**Res Judicata.**” It is submitted that the application is identical to a previous application dated **18th July 2016** involving the same parties which application was determined by the Ruling delivered by **Hon Justice Olga Sewe** on **22nd September 2017**. The Defendants argue that the present application ought therefore to be struck out. The Plaintiff denies that this application is “**Res Judicata**”. It is contended for the Plaintiff that the present application raises new issues which were not dealt with in the previous application of **18th July 2016**. Only one issue arise for determination:-

- i. Is the application dated **14th December 2018** “**Res Judicata**”?

RES-JUDICATA

9. Section 7 of the **Civil Procedure Act Cap 21, laws of Kenya** provides as follows:-

“No Court shall try any suit in which the matter 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 court competent to try such subsequent suit or suits in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

10. In the case of **JANE WANGARI MURAYA –VS- KENYA COMMERCIAL BANK LIMITED & Another 2017 eKLR**, the ingredients for Res judicata were stated to be the following:-

- i. Where the matter directly and substantially in issue has been directly and substantially in issue in the former suit.
- ii. The matter was between the same party or between parties under whom they or any of them claim litigating under the same title.
- iii. The matter has been heard by a court of competent jurisdiction.
- iv. The matter has been finally decided.

11. The rationale behind the “**Res Judicata**” rule was held in the case of **NANCY MWANGI T/A WORTHLIN MARKETERS –VS- AIRTEL NETWORKS (K) LTD (formerly Celtel Kenya (Ltd) & 2 others [2014] eKLR** to be

- a. To prevent a multiplicity of suits which would ordinarily clog the courts and leave unnecessary costs on the parties.
- b. To ensure that litigation comes to an end.

12. In **DAVID MWANGI MANYEKI –VS- TARSIANA NTHUA NYAGA [2017] eKLR** the Court held that:-

“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter.”

13. The Defendants allege that the Plaintiff’s application of **14th December 2018** is virtually identical to the Plaintiffs previous Notice of Motion dated **18th July 2016**. I have carefully considered both applications. In the present application the Plaintiff seeks conservatory orders to preserve the suit property by preventing the 2nd Defendant, his agent or representatives **“or any other person or entity”** from transferring or in any other way disposing of the suit property pending the determination of the main suit. In the Notice of Motion dated **18th July 2016**, prayer (c) sought as follows:-

“That an order do issue preserving the suit property thereby stopping the Defendants either by themselves or through their agents, servants, employees and/or representative or any other person or entity from selling, disposing off, charging further, subdividing and/or interfering in any manner with the suit property pending the hearing and determination of the main suit.”

14. There can be no doubt that the orders sought in the two applications are in fact identical. Both applications sought for orders to preserve the suit property pending the hearing and determination of the main suit. I note further that the parties to both applications are the same. Although it has now transpired that the property has been sold to a third party the use of the words **“any other person or entity”** cover and include this 3rd party as well as the bank being **Standard Chartered Bank**, who were allowed to join the suit as interested parties.

15. The Application of **18th July 2016** was heard and determined vide the ruling delivered by **Hon Justice Olga Sewe** on **22nd September 2017**. In that ruling the Hon Judge dismissed the Plaintiffs application and declined to grant the conservatory orders sought. More pertinently the learned Judge declined to prevent a transfer of the suit property to the 2nd Defendant.

16. In **E.T.S –VS- ATTORNEY GENRAL & ANOTHER [2012] eKLR** it was held thus:-

“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolve by a court of competent jurisdiction.”

17. The previous application was heard and determined by a court of competent jurisdiction. The Plaintiff did not seek review of that decision nor did they file any appeal against the ruling. Instead the Plaintiff apparently went to sleep and took no action until last year when they filed an identical application.

18. The Plaintiff in opposing the Preliminary Objection submits that their application of **14th December 2018** is not res judicata as it is grounded on facts which are different from the previous application. They claim that the new fact is the sale of the suit property to a third party. The Plaintiff claims that the 2nd Defendant intentionally charged the suit property to Standard Bank so as to cleverly default in payment of the loan in order to have the property sold. This argument is devoid of any logic.

19. Firstly the 2nd Defendant being the legal proprietor of the suit property pursuant the transfer of said property to him in the year 2007 had the right to utilize the property as he wished. He was therefore at liberty to utilize the suit property as security to secure a loan facility. The Plaintiff mischievously made no mention of this. The Plaintiff cannot seek by this application to dictate how the legal owner chooses to utilize his property. There is no evidence that the 2nd Defendant’s action charging of the suit property to the bank in order to secure a loan was malicious. In any event people do not ordinarily take loans with the intention of defaulting in repayment.

20. Secondly and more importantly the Plaintiff no longer has any proprietary interest in the suit property. The property was sold and transferred to the 2nd Defendant way back in 2007. The Plaintiff and her family were evicted from the said property. The Plaintiff took no action to challenge this. She filed no appeal against the Ruling of **22nd September 2017**. From **2007** to the year **2018** the Plaintiff kept silent. It is also pertinent to note that Bank upon recovering its dues from the first auction paid to the Plaintiff’s husband the balance of **Kshs.11,882,514.30**.

21. The Plaintiff’s claim that there are new issues which were not raised or determined in the previous application is not tenable. I refer to paragraphs 21 and 22 of the Ruling of **Justice Olga Sewe** where she held:-

“Also pertinent is the undisputed fact that the Plaintiff’s husband was paid the balance of the sale proceeds, thus bringing to a close the exercise of the charges statutory power of sale and accordingly extinguishing the chargor’s right of redemption....”

22. The Court found that the original chargors’ right of redemption had been extinguished as the property had already been sold, title had already passed to the 2nd Defendant and the balance of the proceeds of sale had already been paid to the Plaintiff. By raising this matter again the Plaintiff is inviting this Court to review or sit in appeal over a decision of a court of concurrent jurisdiction. I decline this invitation. This question of ownership of the suit property was finally and conclusively determined by the Court in its ruling of **22nd September 2017**. Having decided not to take any action after the ruling of **22nd September 2017**, the Plaintiff cannot now raise the same issues couched in a new application. This amounts to an abuse of court process.

23. Finally, I find that indeed this application is indeed **res judicata**. The issues raised were heard and determined by a Court of competent

jurisdiction. This application comes too late in the day and is purely an afterthought. The Plaintiff has no locus in the matter as she no longer holds any proprietary interest in the suit property.

24. Accordingly the application dated **14th December 2018** is struck out with costs to the Defendants. The Interested Party being Standard Chartered Bank is at liberty to proceed to conclude the sale and transfer of the suit property to the new buyer.

Dated in Nairobi this 30th day of September 2019.

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Justice Maureen A. Odera