



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC MISC. APPL.NO. 14 OF 2017

EDNA CHERONO BORE.....GUARANTOR/APPLICANT

VERSUS

SPIRE BANK LIMITED.....LENDER/RESPONDENT

GURAM INVESTMENTS AUCTIONERS.....AUCTIONEER/AGENTS

R U L I N G

1. The applicant, Edna Cherono Bore moved this court vide a Miscellaneous Application dated 12/10/2017 which was supported by her sworn affidavit bearing the same date. The application was brought under **Order 40 (1) Order 51, of the Civil Procedure Rules, Section 1A, and 3A** of the **Civil Procedure Act Cap 21** of the **Laws of Kenya, Articles 45, 50 and 160** of the **Constitution of Kenya 2010**.
2. The said Notice of Motion sought an order that the respondents and their agents be restrained from selling, alienating, disposing of, or in whatever manner interfering with property **No. LR.2116/1150 (I.R.No. 52527) Kibomet** area of Kitale Municipality pending the hearing and determination of that application.
3. The applicant's grounds are that she guaranteed Pampa Chourascaria Limited who are the principal borrowers for **Kshs.60,000,000/=** from the 1st defendant and now that principal borrower has defaulted on repayment despite assuring the applicant that it was repaying the loan monies and further that the 1st defendant advertised her property for sale as a consequence of the principal borrowers default. It is also stated that the property was worth about **Kshs.322,000,000** as at 2013 but the same has now been valued at **Kshs.105,000,000/=** which valuation to the applicant, is based on apparent malice, thus exposing the applicant to irreparable loss and damage. It is alleged that the applicant intends to hive off **4 acres** from the charged land for sale to liquidate the guaranteed amount. The applicant therefore appears to be praying for more time to clear the guaranteed sum.
4. The 1st respondent filed a replying affidavit dated 17/10/2017 sworn by one John Wageche the 1st respondent's legal officer. However without first delving into the substantive grounds contained in that affidavit, I must mention that the 1st respondent also filed a Notice of Preliminary Objection dated 17/10/2017 in which it raised the following grounds of objection to the Miscellaneous Application:-
 - (1) **That the application offends Section 7 of the Civil Procedure Act Cap 21 of the Laws of Kenya as the issues have been litigated in Kitale ELC No. 59 of 2017 - Edna Cherono Bore -vs- E.C.B and 2 Others.**
 - (2) **The application is fatally defective for having moved the court in a manner not prescribed by law contrary to Order 3 Rule 1 of the Civil Procedure Rules 2010.**
 - (3) **The application be struck out with costs.**
5. This is the Notice of Preliminary Objection subject of this Ruling. The parties were ordered to file their submissions on the Preliminary Objection on 2/11/2017. The same were to be filed and served within 14 days. By 7/12/2017 the applicant had not filed her submissions on the Preliminary Objection. She had also not filed any submissions by 29/1/2018, prompting the court to revoke all previous directions.
6. As the Preliminary Objection may legally dispose of the entire application and the objector has filed its submissions on it, this court will consider the objection first.
7. On the first ground in the objection, the respondent states that **Section 19 of the Civil Procedure Rules** provides as follows:-

“Every suit shall be instituted in such a manner as may be prescribed by the Rules”

8. It also cites **Order 3 Rule 1 of the Civil Procedure Rules** which states that:-

“Every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed”.

9. The respondent cites the case of **Peter Kwema Kahoro -vs- Benson Maina Githethuki [2005] eKLR** which the court stated as follows:-

“the only objection which has caused me anxiety is the one directed at the manner in which the applicants have originated these proceedings. Section 19 of the Civil Procedure Act provides as follows:-

“19. Every suit shall be instituted in such manner as may be prescribed by rules”.

And Order IV Rule 1 of the Civil Procedure Rules reads:-

“1. Every suit shall be instituted by presenting a plaint to the Court or in such other manner as may be prescribed”.

The Civil Procedure Rules provide other modes of instituting proceedings. These include matters that may be instituted by way of Originating Summons or Motions, Applications for Judicial Review and proceedings under Advocates Act.

In the light of the above, I am not persuaded that the Applicants were entitled to institute these proceedings by way of a Chamber Summons in a miscellaneous application. Being of this persuasion I find and hold that the application dated 2nd February, 2005 and filed on 4th February, 2005 is incompetent and it struck out with costs”.

10. He also cites the case of **Geoffrey Ndungu Theuri -vs- Law Society of Kenya 1998 eKLR** in which the court stated as follows:-

“...The order specifically refers to a suit which is defined under Section 2 of the Civil Procedure Act in these terms: ‘suit’ means all civil proceeding commenced in any manner prescribed under the Civil Procedure Rules and an applicant is not entitled under Order 39 of the Civil Procedure Rules to seek or obtain an order for injunctive relief against another party without filing a suit. The grossly abused Section 3A of the Civil Procedure Act does not give the court the power to act without jurisdiction”

11. The respondent avers that the applicant has moved the court by way of an alien procedure and that consequently there is no suit before this court hence the application should be struck out.

12. There was no submissions filed by the applicant as at the date of writing this Ruling. However I have noted that the supplementary affidavit dated 30/10/2017 attempts to answer the preliminary objection. I am bound to consider it. It states that there were more than 3 respondents in **Kitale ELC Case No. 59 of 2016**, that the contents of the two proceedings are not the same, that there is no basis for concluding that the current Miscellaneous Application is *res judicata*, that at no time has the applicant attempted to mislead the court and that the application has been brought under the “relevant” provisions of the law hence the court should adjudicate it notwithstanding the sentiments of the respondent.

13. I would wish to address the first limb of the Preliminary Objection. When the issue was raised, it was upto the applicant to satisfy the court that she had brought a competent suit before the court which she failed to do. Nevertheless the contents of this record speak for themselves. There was no plaint filed in accordance with **Order 3 Rule 1 of the Civil Procedure Rules**. There was no other pleading by whatever manner so authorized by the Civil Procedure Rules which the applicant could premise her application on.

14. The Miscellaneous Application filed by the applicant hangs in the air, so to speak. It is not anchored or rooted on any pleading that may give it validity. I find that the objection by the 1st respondent has merit and should be upheld. That being the case, I do not find any good reason to delve into the issue of *res judicata* as the first limb of the Preliminary Objection alone is sufficient to dispose of this application.

15. I therefore strike out the application dated **12/10/2017** with costs to the 1st respondent only.

Dated, signed and delivered at Kitale on this **28th** day of **February, 2018**.

MWANGI NJOROGE

JUDGE

28/2/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty/Collins

Mr. Karani holding brief for Wilson for Respondent

N/A for Applicant

COURT

Ruling read in open court in the presence of counsel for the Respondent.

MWANGI NJORGE

JUDGE

28/2/2018