



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. 501 OF 2016**

**ABUDALLAHI MOHAMMED SHEIKH.....PLAINTIFF**

**VERSUS**

**GULF AFRICAN BANK LIMITED.....DEFENDANT**

**RULING**

[1] The Plaintiff/Applicant, **Abdullahi Mohammed Sheikh**, approached the Court vide his Notice of Motion dated **19 December 2016** for orders, inter alia, that a temporary injunction be issued by the Court, restraining the Defendant/Respondent by itself, through its agent, employees and/or servants, assigns or any other person whatsoever acting on its behalf and/or under its mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with the properties known as **Land Reference Numbers 209/260/19388, 209/7260/19389 and 209/7260/72** pending the hearing of this suit.

[2] That application was heard and a determination thereon made on the **22 December 2017**. The Court was of the view that:

**"...The prima facie picture that emerges from the foregoing is that of acknowledgement of indebtedness on the part of the Plaintiff; and an acknowledgement that the Defendant has over the years exercised nothing but patience and understanding towards the Plaintiff. There is no indication that there is in existence a right of the Plaintiff's that has been violated or threatened with violation. Indeed, these averments were not rebutted by the Plaintiff. Thus, the Plaintiff has not only admitted that he failed to meet his monthly repayment obligations when he sought the restructuring of the repayment terms of the facility; but also that he failed to demonstrate that he employed the suggestions proposed by the Bank to enable him clear the arrears...In the foregoing premises, the Court is not satisfied that a prima facie case has been made out herein by the Plaintiff to warrant the issuance of the injunctive order sought..."**

[3] The Plaintiff's application dated **19 December 2016** was accordingly dismissed with costs. Thereupon the Plaintiff, replaced its erstwhile Advocates, **Hassan N. Lakicha & Company Advocates**, with the firm of **Githinji & Associates Advocates**, through whom he filed the Notice of Motion dated **29 January 2018**, seeking the following orders:

**[a] Spent**

**[b] That the Court be pleased to stay the execution of its orders issued on 22 December 2017.**

**[c] That the Court be pleased to review and/or set aside the interim orders issued on 22 December 2017;**

**[d] That the costs of the application be borne by the Respondent;**

**[e] That the Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.**

[4] The application was premised on the grounds that the Suit Property was on the verge of being auctioned by **M/s Leakey's Auctioneers**, having been advertised for sale on the **1 February 2018** in satisfaction of the orders issued on **22 December 2017**; and that the Plaintiff was ready to repay the amount due to the Defendant by making deposits of **Kshs. 500,000/=** per month and such other deposits as may be ordered by the Court. It was further the contention of the Plaintiff that he stood to suffer immense prejudice and irreparable damage should the sale be proceeded with. The application was filed under a Certificate of Urgency; and therefore, on the **31 January 2018**, upon the Defendant

being served for inter partes hearing, and having heard the parties and reserved its Ruling, the Court granted orders in the following terms:

***"...I note that the sale is scheduled for tomorrow 1 February 2018. No plausible explanation has been given as to why the Plaintiff waited until 29 January 2018 to seek the intervention of the court for review. Accordingly, ... it is hereby directed that, pending the delivery of the Court's Ruling herein, the sale of the suit property be stayed but only on condition that the Plaintiff pays all the expenses pertinent to the said auction, including the advertisement costs, by end of the day today; failing which the Respondent will be at liberty to proceed with the scheduled auction as planned."***

[5] Apparently, the Plaintiff did not comply with the order aforesaid. He filed a further application dated **5 February 2018**, praying for orders that he be allowed to pay the sum due to the Defendant on account of the Order of **31 January 2018** (what he called "the decretal sum") in instalments of **Kshs. 500,000/=** per month; and that the costs of the application be provided for. The application was similarly filed under **Sections 1A, 1B, 3, 3A and 80** of the **Civil Procedure Act** and **Order 22 Rule 22** and **Order 45 Rule 1** of the **Civil Procedure Rules, 2010**. He contended that following the aforementioned order, requiring him to pay all expenses pertaining to the auction, including the advertisement costs, he had paid the bank **Kshs. 500,000/=** and **Kshs. 300,000/=** to the Auctioneer. He proposed to pay the balance by monthly payments of **Kshs. 500,000/=**. As the second application had a bearing on the first application dated **29 January 2018**, the Court, gave directions that further submissions be made in writing to enable a composite Ruling by the Court on **13 April 2018**.

[6] Undeterred, the Plaintiff filed a third application dated **13 March 2018** on **14 March 2018** under a Certificate of Urgency seeking to restrain the Defendant from disposing of the Suit Property on **29 March 2018** with a view of providing him with an opportunity to clear his debt. The application was argued on **23 March 2018** and Ruling reserved for **13 April 2018**. Thus, there are three applications before the Court for determination, which I propose to deal with sequentially.

#### **The First Application:**

[7] The Notice of Motion dated **29 January 2018** was filed under **Sections 1A, 1B, 3, 3A and 80** of the **Civil Procedure Act** as well as **Order 22 Rule 22** and **Order 45 Rule 1** of the **Civil Procedure Rules**. It basically seeks two main orders, namely stay and review of the orders issued herein on **22 December 2017**. According to the Plaintiff, the Defendant had proceeded to advertise the Suit Property for sale in execution of the orders of the Court made on **22 December 2017**; and that he stands to suffer irreparably should the sale be proceeded with as proposed. In support of the application, the Plaintiff relied on his affidavit sworn on **29 January 2018** wherein he averred that, he is ready to repay the amount due to the Respondent by making deposits of **Kshs. 500,000/=** a month and such other deposits as may be ordered by the Court. To demonstrate his commitment in this connection, the Plaintiff annexed, as **Annexure AMS 2**, copies of deposit slips and receipts to prove that he had commenced payments already. He added that he would suffer immense prejudice and damage should the Suit Property be sold.

[8] In a Replying Affidavit sworn on **30 January 2018** by **Lawi Sato**, the Defendant's Legal Officer, the Defendant expressed its opposition to the application, contending that the Plaintiff had previously made similar requests but failed to honour his promises; and that from **December 2016** to the date of the application, the Plaintiff had only paid **Kshs. 3.11 million**, and therefore was not sincere in his proposal. It was further averred that, in proposing to pay **Kshs. 500,000/=** for an outstanding debt of over **Kshs. 112,000,000**, with an accruing a monthly profit of **Kshs. 592,000/=**, the Plaintiff would, in effect, be servicing only the profit while leaving the principal sum unaffected.

[9] I have carefully considered the First Application, the grounds upon which it has been brought, the averments in the affidavits filed in respect thereof and the submissions made by Learned Counsel. It was filed against the backdrop of the dismissal of the Plaintiff's injunction application. Accordingly there is, strictly speaking no orders of the Court for execution that can be said to directly flow from the Ruling dated **22 December 2017**. Ordinarily, stay of execution application is an application that would be envisaged under **Order 42 Rule 6** of the **Civil Procedure Rules**, which provides that:

**(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order...**

**(2) No order for stay of execution shall be made under sub-rule (1) unless--**

**(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."**

[10] Consequently, the Plaintiff would have been under obligation to demonstrate that:

**[a] he stands to suffer substantial loss unless the stay order is made;**

**[b] that the application has been made without unreasonable delay.**

**[c] that he has provided security or is ready to provide such security as the court may order.**

[11] In this instance, however, there is no appeal envisaged for the suit was filed by the Plaintiff and the decision in question was a dismissal order in respect of an application for interlocutory injunction. To the extent therefore that the Ruling of **22 December 2017** was not a final judgment or decree capable of execution, it is my finding that the application is misconceived. Secondly, and more importantly, is the fact

that the order sought to be stayed is a negative order. It is now trite that such orders are not amenable to stay. In Western College of Arts and Applied Sciences vs. Oranga and Others [1976-80], the Court of Appeal (per Law, VP) held that:

**The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs ... the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered..."**

[12] I note too that the provision relied on by the Plaintiff to found the stay aspect of the application is **Order 22 Rule 22** of the **Civil Procedure Rules. Rule 22(1)** provides that:

**The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.**

[13] Again, it is manifest that **Rule 22** is inapplicable to the facts hereof. There is no decree that has been sent to this Court for execution. The sums that the Plaintiff now proposes to pay in instalments are of two kinds; the first comprises the funds borrowed from the Defendant in respect of which the Defendant has been intent to realize by way of sale of the charged Suit Property. The exact extent thereof is yet to be ascertained as the main suit filed by the Plaintiff is still pending hearing and determination. The second aspect is the expenses relative to the auction that was initially scheduled for **1 February 2018**. In this regard, the Plaintiff was to liaise with the Defendant within the window of time provided in the Order of **31 January 2018**, namely, by end of business on that **31 January 2018**. The Plaintiff having failed to comply therewith, that Order was spent; with the result that the Defendant was at liberty to proceed with the auction as planned. It matters not that the auction did not take place. Thus, there would, in effect, be nothing to stay.

[14] As for the application for review, **Section 80** of the Civil Procedure Act, which was cited by the Plaintiff, recognizes that:

**Any person who considers himself aggrieved--**

**(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.**

[15] In addition thereto, **Order 45 Rule 1** of the **Civil Procedure Rules**, provides that:

**(1) any person considering himself aggrieved-**

**(a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred, or**

**(b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

[16] From the aforesaid provisions, a party seeking review is under obligation to demonstrate that:

**[a]** there has been discovery of new and important matter or evidence which after due diligence, was not within the applicant's knowledge or could not be produced at the material time;

**[b]** there is some mistake or error apparent on the face of the record; or

**[c]** that there was any other sufficient reason;

[17] There was absolutely no attempt by the Plaintiff to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time the injunction application was heard. It was not his contention that there is some mistake or error apparent on the face of the record to warrant a review. Indeed, he premised the review application on the averment that he is now ready to pay the amount due to the Defendant by monthly instalments of **Kshs. 500,000/=**. That is no ground for review and would not qualify as "**other sufficient reason**" for purposes of **Section 80** of the **Civil Procedure Act and Order 45 Rule 1** of the **Civil Procedure Rules**. Thus, it is my finding that the First Application is completely lacking in merit and is hereby dismissed with costs.

#### **The Second Application:**

[18] The Plaintiff's second application, dated **5 February 2018**, seeks that he be allowed to pay the sum due to the Defendant on account of the Order of **31 January 2018** in instalments of **Kshs. 500,000/=** per month; and that the costs of the application be provided for. The application was similarly filed under **Sections 1A, 1B, 3, 3A and 80** of the **Civil Procedure Act** and **Order 22 Rule 22** and **Order 45 Rule**

1 of the **Civil Procedure Rules, 2010**. It was the Plaintiff's contention that, following the aforementioned order, he was given a bill of **Kshs. 1,673,180/=** by the Defendant to pay, being expenses pertaining to the subject auction, including the advertisement costs; and that he paid the bank **Kshs. 500,000/=** and a further sum of **Kshs. 300,000/=** to the Auctioneer. He thus proposed to pay the balance by monthly payments of **Kshs. 500,000/=**.

[19] The Second Application was similarly opposed by the Defendant and a Replying Affidavit filed thereto, sworn by **Prestone Wawire**, Advocate. He averred that he has conduct of this matter; and that it was within his own personal knowledge that an order was made herein on **31 January 2018**; and that immediately after the issuance of the said order, he communicated the terms of the order to the Bank and the Auctioneers; and informed them to prepare their costs for settlement by the Plaintiff. Consequently, the Auctioneers quickly prepared their bill in the sum of **Kshs. 1,673,180/=** and forwarded the same to the Plaintiff's Advocates via email on **31 January 2018** at 1.27 p.m. Copies of the email and invoice were exhibited as annexures to the Replying Affidavit. It was further the averment of the Defendant that the Plaintiff's Advocates acknowledged receipt of the email and promised, via return email, to forward to their client for settlement before close of business; but that, ultimately, the Plaintiff failed to comply. A copy of the Plaintiff's letter dated **31 January 2018** by which his inability to comply was intimated, was also exhibited at page 4 of the Defendant's **Annexure PW-1**. The Plaintiff thereby pleaded to be allowed by the Defendant to pay the balance of **Kshs. 1,373,180** on or before **28 February 2018** and indicated that the sum of **Kshs. 300,000** had already been deposited to the account of the Auctioneers.

[20] It is evident therefore that the Plaintiff failed to comply with the Court Order; and as has been indicated hereinabove, having thus failed to comply by end of business on **31 January 2018**, the Order of **31 January 2018** lapsed; and the Defendant was accordingly at liberty to proceed with the sale. Indeed, in the Replying Affidavit sworn by **Mr. Wawire**, he averred that upon receiving the Plaintiff's letter aforementioned, he informed the Bank and the Auctioneer that they were at liberty to proceed with the sale; and that the Suit Property was accordingly put up for sale, but was not sold solely because the bids made fell below the Forced Sale Value. In the premises, the application to pay the Auctioneer's expenses by instalment is untenable and is accordingly hereby dismissed with costs.

#### **The Third Application:**

[21] The Third Application is the Notice of Motion dated **13 March 2018**. It seeks that the Defendant be restrained from auctioning, disposing off and/or interfering with the Suit Property. It was necessitated by the re-advertisement of the Suit Property for sale on **29 March 2018**. In support thereof, the Plaintiff averred, in his Supporting Affidavit sworn on **13 March 2018**, that on **12 March 2018**, the Defendant caused to be advertised in the Nation Newspaper that he owed it **Kshs. 112,575,519.32**; and that the Suit Property would be sold on that account on **29 March 2018**. The Plaintiff further averred that he was already liquidating the loan at the rate of **Kshs. 500,000/=** per month and had paid the Auctioneers their fee of **Kshs. 700,000/=**, leaving a balance of **Kshs. 500,000/=** which he promised to pay on or before **15 April 2018**. He therefore prayed that the intended auction scheduled for **29 March 2018** be put off to allow him time to clear his debt.

[22] The response of the Defendant to the Third Application was vide the Preliminary Objection dated **20 March 2018**. According to the Defendant, the Third Application was similar to the Plaintiff's initial application dated **19 December 2016** which culminated in the Ruling dated **22 December 2017**; and therefore that the instant application is res judicata. Counsel for the Defendant, **Mr. Wawire**, relied on the following cases in support of his arguments:

[a] **Uhuru Highway Development Limited vs. Central Bank of Kenya & 2 Others [1996] eKLR** to support the argument that once an application for injunction within a suit has been heard and determined under the principles as laid down in **Giella vs. Cassman Brown**, a similar application cannot be brought unless there are new facts, not brought before the Court earlier after exercise of due diligence, which merit a re-hearing and possible departure from the previous ruling.

[b] **Invesco Assurance Company Limited vs. Mercy Nduta Mwangi t/a Mangi Keng'ara & Company Advocates [2017] eKLR** for the holding that, where a given matter becomes the subject of litigation, and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to put forward their whole case, and will not permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because of negligence or inadvertence.

[c] **Theresa Costabir vs. Alka Roshanlal Harbanslal Sharma & Another [2015] eKLR** for the holding that res judicata envisions not just issues that were directly before the Court previously, but also facts that could have been raised with the exercise of due diligence.

[23] I have given due consideration to the Preliminary Objection and the arguments made herein in respect thereof. In **Section 7** of the **Civil Procedure Act**, the res judicata principle is set out thus:

**“No Court shall try any suit or issue in which the matter 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...and has been heard and finally decided by such Court.”**

[24] In an explication of this provision in **Bernard Mugo Ndegwa Vs James Nderitu Githae and 2 Others [2010] eKLR** the Court distilled the applicable considerations to be as follows:

[a] The matter in issue must be identical in both suits.

[b] The parties in the suit must be substantially the same.

[c] There is concurrence of jurisdiction of the Court.

[d] That the subject matter is the same and finally,

[e] That there is a final determination as far as the previous decision is concerned.

[25] In the instant matter, the issue is not in connection with two suits; but applications in the same suit; and since it is trite that *res judicata* applies to applications in the same manner it does to substantive suits, the same considerations apply. Thus, it goes without saying that all the four applications herein are between the same parties and that there is concurrence of jurisdiction of the Court. The only issue that requires consideration is *whether the subject matter is the same, and whether a final determination has been made in connection therewith.*

[26] Of the three applications filed after the Ruling of **22 December 2017**, no application for temporary injunction has been brought by the Plaintiff. The First Application, namely the Notice of Motion dated **29 January 2018**, was for stay and review; the Second Application dated **5 February 2018** was for leave to pay the "**decretal sum**" by instalments; while the Third Application dated **13 March 2018** is similarly for leave to pay by instalments, but specific to the second advertisement for sale that was scheduled for **29 March 2018**; and though it entails what appears to be injunctive relief, it was expressed to have been filed, inter alia, under **Section 80** of the **Civil Procedure Act** and **Order 45 Rule 1** of the Civil Procedure Rules. In connection with the application for payment by instalments, it is manifest that the Court had not pronounced itself on the Second Application by the time the Third Application was filed. In the premises, it is my finding that the Third Application is not *res judicata*.

[27] There is however no gainsaying that the orders sought therein are essentially the same orders sought in the First and Second Application; and having found that there is no justification for review and/or payment by instalments, the conclusion that I come to in respect of the Third Application is that the same is an abuse of the process of the Court, having been filed for the same reliefs during the pendency of the First and Second Applications. The same is accordingly dismissed with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF APRIL, 2018**

**OLGA SEWE**

**JUDGE**