



Njuguna v KCB Bank of Kenya Limited & 2 others (Environment & Land Case E023 of 2023) [2023] KEELC 22432 (KLR) (19 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22432 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E023 OF 2023
LC KOMINGOI, J
DECEMBER 19, 2023**

BETWEEN

LUCY WANJIRU NJUGUNA PLAINTIFF

AND

KCB BANK OF KENYA LIMITED 1ST DEFENDANT

SAMUEL NJUGUNA THUKU 2ND DEFENDANT

THUMA DISTRIBUTORS CO LTD 3RD DEFENDANT

RULING

1. This is the Notice of Motion dated 8th September 2023, brought under;

Section 10 of the *Judicature Act*, Cap 8 Laws of Kenya, Rule 3(1) 3(2) of the *High Court (Practice and Procedure Rules)* and any other enabling procedures of the law.
2. It seeks Orders;
 - i. Spent
 - ii. That a temporary injunction to issue, restraining the 1st Respondent, its servants, employees and/or agents from, in any way, advertising, alienating, transferring, or howsoever dealing with, disposing, selling and/or proceeding with the scheduled intended sale by way of Public Auction of the applicants' matrimonial home known as Kajiado/Kaputiei North/ 26763 Muigai Prestige Estate, Kitengela, Kajiado County (the suit property) thereof pending the inter parties hearing and determination of the application.
 - iii. That a temporary injunction to issue, restraining the 1st Respondent its servants from in any way, alienating, transferring, or howsoever dealing with,



disposing, selling and/or proceeding with the scheduled intended sale by way of public auction of the Respondent's (sic) matrimonial home known as Kajiado/Kaputiei North/ 26763 Muigai Prestige Estate, Kitengela, Kajiado County (the suit property) thereof pending the inter parties hearing and determination of the suit.

- iv. That the costs of the application to be provided for.
3. The Application supported by the sworn Affidavit of Lucy Wanjiru Njuguna is premised on the grounds that she is married to the 2nd Respondent and resides on the suit property Kajiado/Kaputiei North/ 26763 Muigai Prestige Estate, Kitengela, Kajiado County with her four children. That sometime in 2016, the 2nd Respondent who is a director of the 3rd Respondent informed her that the 3rd Respondent wanted a loan facility and they would use land parcel number Kajiado/Kaputiei North/42535 as security. The 2nd Respondent would later give her several documents to sign which he indicated were consents in relation to the said property.
4. She further stated that sometime in April 2022 someone from Ark Consultants Limited visited the matrimonial home and informed her that he was carrying out a valuation of the house in regards to a services loan taken by the 3rd Respondent. Following this, she sought information from the 1st respondent regarding the said loan facility but she has never received any information. On 6th August 2023 a redemption Notice and a Notification of Sale of the suit property were delivered at the suit property. She once again (through her advocates) sought clarification of the alleged loan from the 1st and 2nd Respondents but they were unresponsive.
5. She vehemently denies ever consenting to charging the matrimonial property and avers that if the illegal sale takes place she will suffer irreparable loss and damage which cannot be compensated by an award of damages.
6. The 1st Respondent in its Grounds of Opposition dated 13th October 2023 and Replying Affidavit dated 3rd November 2023 sworn by Elizabeth Ngugi the Branch Manager, contested the application on grounds that it was Res Judicata since the issues raised were similar to the ones raised in HC Commercial Civil Suit No. E312 of 2022 in which Majanja J. had ruled on and allowed the sale of the suit property. Additionally, the application was sub judice since that case was still pending in court. As such the application did not meet the threshold for grant of interlocutory injunction. The 1st Respondent contested the allegation that the Applicant did not consent to the charge indicating that the consent documents were duly signed by the Applicant and commissioned by a qualified Advocate.
7. The Notice of Motion was canvassed by oral submissions.

The Applicant's Submissions

8. Counsel submitted that the suit property was matrimonial property and she had not consented to the charge over that particular property. Counsel added that the 1st Respondent had not acted as per Section 97(2) of the *Land Act* citing *Margaret Muthoni Njoroge v Housing Finance Company Limited & another* [2020] eKLR. As such, disposing it off would cause the Applicant irreparable loss and damage and the balance of convenience titled in the Applicant's favour.

The 1st Respondent's Submissions

9. Counsel for the 1st Respondent submitted that the suit and application was res judicata because the court in HC Commercial Civil Suit No. E312 of 2022 dismissed the application seeking injunctive



- orders against sale of the 2nd Respondent's properties including the property in issue allowing the 1st Respondent to exercise its statutory power of sale.
10. Counsel submitted that the aforementioned suit whose issues were similar to the issue in the current suit was sub judice because it was ongoing at the High Court and Tax division, Milimani. As such, the Applicant was estopped from filing a multiplicity of suits as was held by the Supreme Court in *Kenya National Commission on Human Rights vs Attorney General; Independent Electoral Boundaries Commission & 16 others (Interested parties)* (2020) eKLR. As such the Applicant was not entitled to orders sought since she had not met the threshold articulated in *Giella vs Cassman Brown & Co. Ltd* [1978] EA and the application had been brought in bad faith.
 11. Counsel prayed for the suit to stayed awaiting the determination of HC Commercial Civil Suit No. E312 of 2022 to avoid conflicting judicial decisions.

Analysis and determination

12. I have considered the pleadings, the Notice of Motion, the affidavit in support and the response thereto, the rival submissions and the authorities cited. The issues for determination are:
 - i. Whether Applicant is entitled to grant of interlocutory injunction as prayed.
 - ii. Whether the Application offends the doctrine of Res judicata and sub judice.
 - iii. Who should bear costs of this Application?
13. The Applicant prays for an interlocutory injunction on grounds that the 1st Respondent intends to sell Kajiado/Kaputiei North/ 26763 which is her matrimonial property. She claims that she did not consent to the charge and if the sale is effected she will suffer irreparable loss and damage since she resides in that property with her children.
14. The 1st Respondent has contested the application on grounds that it is *Res Judicata* and *Sub judice* because the same issues were in HC Commercial Civil Suit No. E312 of 2022 and the application and or suit had been brought in bad faith.
15. The court shall first determine the issue of res judicata and sub judice since these are jurisdictional issues which should be dealt with at the earliest opportunity.
16. The doctrine of res judicata is enshrined in Section 7 of the *Civil Procedure Act* which provides that;

“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 such court.”
17. That Section has also provided explanations with respect to the application of the res judicata rule in the following terms:

“Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.



Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

18. The Supreme Court in *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* [2016] eKLR held as follows regarding the doctrine of res judicata:

“(52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights.”

19. In *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 (KLR) the Supreme Court went on to state:

“58. ...whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction.”

20. The Court has looked at the Ruling delivered on 10th March 2023 which the 1st Respondent claimed to have settled the issues in question as annexed in its Replying Affidavit. The Court notes that HCCC No. E312 of 2022 is between the 3rd Respondent (as the Plaintiff) and the 1st Respondent (as the Defendant). The Ruling reads in part:

“

“1. 1. Before the Court for determination is the Plaintiff’s Notice of Motion dated 3rd August 2022... The Plaintiff seeks an order that pending hearing and determination of this suit, the court grant a temporary order of injunction restraining the Defendant (the Bank) from selling from public auction or otherwise interfering with the Plaintiff’s occupation and ownership of title of the following parcels of land: LR No. ... Kajiado/ Kaputiei- North/42535, Kajiado/ Kaputiei- North/26763...

...”



13. Having evaluated the grounds raised by the Plaintiff against the Bank's response, I am unable to find in favour of the Plaintiff, at least on a prima facie basis...

...

21. The Plaintiff Director has also stated that the suit properties are his home and those of his siblings and are of great sentimental value to him. That the suit properties reflect the crystallisation of his labour and that unless preserved by an order of court, the Bank will treat the same as commodities of sale with blatant disregard to law and procedure... I hold that the Plaintiff must have been well aware that in obtaining the credit facilities from a bank and securing the same with the suit properties, they would have to be sold in case of default. Once a property is offered as a security, it indeed, becomes a commodity for sale as stated by the Plaintiff, but in any case, there is no commodity for sale whose loss cannot be compensated adequately in damages.

22. Finally, the Bank, having issued the requisite statutory notices and given the Plaintiff a chance to rectify its default and redeem the securities, cannot be deemed to have acted in bad faith as contended by the Plaintiff. If anything, I find that the Bank has been indulgent with the Plaintiff. I therefore find that the Plaintiff has failed to demonstrate a prima facie case with a probability of success...

23. The Plaintiff's application dated 3rd August 2023 is dismissed with costs to the Defendant."

21. The Supreme Court in the John Florence Maritime case (*supra*) outlined:

"59. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d) There must be between the first and the second action identical parties, subject matter and cause of action."

22. I find that the current suit/ application has met the elements for consideration in determining the question of res judicata. This is evident because the parties involved in both suits are the same (comprising the 1st and 3rd Respondents), albeit with the addition of two more parties (the Applicant and the 2nd Respondent). Moreover, the central issue for determination in both cases revolves around the disposal of properties, encompassing different parcels of land including property Kajiado/Kaputiei-North/26763 (the suit property). Additionally, a competent Court previously made a conclusive determination on this matter, as evidently depicted in the preceding excerpt from the Ruling.

23. The principle of res judicata plays a crucial role in maintaining order and efficiency of the judicial process by preventing multiple suits in different courts on the same issue, taking into consideration



that litigation must come to an end! This was pronounced once again by the Supreme Court in the John Florence Maritime case (*supra*):

“ 54. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”

24. Further, Courts have been urged to be cautious in ensuring that they weed out litigants who come up with crafty ways of evading the doctrine of res judicata such as adding new parties or coming up with new causes of action:

“ 59. That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in *ET v Attorney-General & another*, (2012) eKLR, 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 resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and others*, (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J, in the case of *Njangu v Wambugu and another* Nairobi HCCC No 2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’

25. In conclusion I find the Notice of Motion is res judicata and the same is dismissed with costs to the 1st Defendant.

26. Similarly the suit herein is sub judice as there is a pending suit HCCC Commercial Suit E312 of 2022; Thuma Distributors Limited v Kenya Commercial Bank Limited.

27. The proceedings herein are stayed pending the outcome of the HCCC Commercial E312 of 2022 Thuma Distributors Ltd. v Kenya Commercial Bank Limited.

DATED, SIGNED AND DELIVERED VIRTUALLY IN KAJIADO THIS 19TH DAY OF DECEMBER 2023.

L. KOMINGOI
JUDGE.



In the presence of:

N/A for the Plaintiff.

Ms. Aisha for the 1st Defendant.

N/A for the 2nd Defendant.

N/A for the 3rd Defendant.

Court Assistant – Mutisya.

