



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 292 OF 2017

WARDPA HOLDINGS LIMITED.....PLAINTIFF

-VERSUS-

CO-OPERATIVE BANK OF KENYA LIMITED.....DEFENDANT

-AND-

EDWARD KANGETHE.....1ST INTERESTED PARTY

GEORGE KANGETHE.....2ND INTERESTED PARTY

RULING

[1] The Notice of Motion dated **13 July 2017** was filed herein by the Plaintiff, **Patrick Kangethe Njuguna**, pursuant to Sections **1A, 1B, 3A** and **63** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**; and **Order 40 Rules 2** and **4** of the **Civil Procedure Rules, 2010**, for the following orders:

[a] Spent

[b] Spent

[c] That an order of injunction do issue restraining the defendant and/or its agents and in particular, **Nguru Auctioneers**, from selling and/or in any manner conceivable disposing off **L.R. No. 209/2489/22** pending the hearing and determination of this suit;

[d] That the costs of this application be provided for.

[2] The application was predicated on the grounds that the Charge document executed in respect of **L.R. No. 209/2489/22** (the Suit Property) was executed in clear breach of the Articles of Association of the Plaintiff; and that the Plaintiff did not execute the Charge document and the signature purported to be his is a forgery. It was further averred that the Deed of Assignment, whose execution was a condition precedent to the disbursement of the loan, was not executed; and that the requisite statutory notices were not issued as required by the law.

[3] The application was supported by the affidavit of **Patrick Kangethe Njuguna** sworn on **13 July 2017**

together with the annexures thereto, wherein he averred that he is one of the directors and shareholders of the Plaintiff company; and that while reviewing the Company's debt portfolio with the help of their accounts staff, he discovered that the loan facility granted by the Defendant and secured by the Suit Premises was not lawfully processed. He particularly noted the following discrepancies:

- [a] The provisions of the Company's Articles of Association were not followed;
- [b] He did not sign the Letter of Offer in respect of the facility;
- [c] The directors did not execute a resolution authorizing the Interested Parties to execute documents relating to this transaction without his participation;
- [d] He did not execute the Charge document in respect of the Suit Property;
- [e] The statutory notice was belatedly issued by the Defendant and therefore had no legal basis;
- [f] The notices issued by the Auctioneers were void for all legal intents and purposes;
- [g] The Deed of Assignment was not executed as required.

[4] It was further averred by the Plaintiff that several months prior to the provision of the facility, all the shareholders and/or directors had passed a resolution to the effect that all of them had to sit together and execute any documents for purposes of committing the Company to Third Parties for such documents to have legal effect. A copy of the resolution was exhibited as **Annexure PKN2** along with copies of the Letter of Offer dated **9 June 2010**, Charge, Statutory Notice, Auctioneer's notice as well as copies of Memorandum and Articles of Association. (marked **PKN1**, **PKN3** and **PKN4**), to demonstrate that the relevant statutory notices were not issued by the Defendant. In addition to the foregoing, it was the Plaintiff's contention that critical conditions precedent to the drawdown, such as the signing of a Deed of Assignment, were not complied with; and that in the light of the aforesaid discrepancies, the intended sale was unlawful and ought not to be countenanced.

[5] The application was opposed by the Defendant. In a Replying Affidavit sworn by the Defendant's Legal Manger, **Mr. Lawrence Karanja**, it was averred that the Notice of Motion dated **13 July 2017** is *res judicata*, since the same issues have been raised, or ought to have been raised and addressed on merit by the **Hon. Mr. Justice P.J.O Otieno** in a Ruling delivered on **26 July 2016** in **Mombasa High Court Civil Suit No. 50 and 54 of 2016: Patrick Kangethe Njuguna & 3 Others vs. Cooperative Bank of Kenya Limited & 4 Others**; in which the Court allowed the Plaintiff's application for injunction, but on the following conditions:

- [a] That within 7 days from the date of the Ruling the Plaintiff was to pay into the loan account the sum of **Kshs. 10,000,000** towards the reduction of the loan; and a further **10,000,000** on or before **15 August 2016**;
- [b] That within 14 days from the date of the Ruling, the Plaintiff was to give to the 1st Defendant a clear and unequivocal acceptable proposal to liquidate the entire debt within a period of not later than 90 days;
- [c] That in default of compliance with any one of the foregoing conditions, the injunction would stand lapsed and the 1st Defendant was to be at liberty to proceed and realize the security through an appointed auctioneer.

[6] According to the Defendant, it was after the Plaintiff failed to comply with the aforesaid conditions that it instructed **Nguru Auctioneers** to sell the Suit Property after ensuring due compliance with the pertinent law, including advertisement of the sale date as required by the law. It was thus the contention of the Defendant that the instant application is merely intended to clog its Statutory Power of Sale; and that the Plaintiff should not be aided in evading its just debts by engaging in endless litigation.

[7] The application was argued on **19 July 2017** and for the Plaintiff, **Mr. Siagi** submitted that the loan was unprocedurally advanced by the Defendant and pointed out that not all the required signatories signed the Letter of Offer. He further submitted that the conditions precedent set out at **Clause 8** of the Letter of Offer were not complied with before drawdown. Counsel further reiterated that Plaintiff's contention that the Charge was signed in contravention of the provisions of the Company's Articles of Association, in that the Defendant had not availed any resolution by the Plaintiff sanctioning the borrowing. He accordingly submitted that the Charge is a nullity and that the notices issued upon that Charge are similarly null and void.

[8] As for the suits that were filed in the High Court at Mombasa, being **HCCC No. 50 of 2016** and **HCCC No. 54 of 2016**, Counsel submitted that their existence was acknowledged by the Plaintiff herein at paragraph 15 of the Plaint, but that the contention of the Plaintiff is that it was not a party thereto; and that this matter is in respect of a different cause of action from the Mombasa suits. He added that the Plaintiff is a blind person, of which fact the Defendant is aware, and that he could not have signed the requisite documents unaided as is purported. It was thus the submission of Learned Counsel **Mr. Siagi** that the application has merit and ought therefore to be allowed and orders granted as prayed.

[9] **Mr. Munge** for the Defendant opened his submissions by pointing out that the Defendant herein is a Company and therefore that the contention that the Plaintiff is a blind person is inappropriate. He further submitted that the suit is *res judicata* given that the same subject herein is the subject matter of the two **Mombasa High Court Cases Nos. 50 of 2016** and **54 of 2016**, in which the Court delivered a consolidated ruling dated **26 July 2016**. He reiterated the Defendant's averments to the effect that in the said ruling, the Court granted an injunction on condition that payment of the sums due be made, which were not complied with. Thereafter on the **19 May 2017**, on the date of the auction, the Plaintiff rushed to Court and the auction was again suspended on condition that the Borrower pays **Kshs. 1 million**; again this was not done. The Defence Counsel urged the Court not to countenance the fact that instead of going back before the Mombasa Court for any further relief, the Plaintiffs thereafter moved to the High Court in Nairobi and filed this suit as well as **Milimani HCCC No. 293 of 2017**, wherein the Plaintiff is **Patrick Kangethe Njuguna**, the deponent of the Supporting Affidavit herein, without disclosing the existence of those previous suits and the orders made therein. He accordingly urged the Court to consider such action as being in abuse of its process and dismiss the application with costs.

[10] In response to the submissions by **Mr. Munge**, **Mr. Siagi** drew the Court's attention to **Paragraph 13** of the Ruling by **Otieno, J** to the effect that any person interacting with a limited liability company must do so within the provisions of the applicable law, in this case the **Companies Act, Chapter 486 of the Laws of Kenya**, which was the applicable law at the time of the borrowing. He added that Counsel for the Applicants in the Mombasa Cases proceeded without the benefit of seeing the relevant documents; and urged the Court to make a determination in favour of the Plaintiff herein.

[11] Having carefully considered the Plaintiff's application, the affidavits filed herein as well as the submissions made by Learned Counsel, it is manifest that indeed, the subject matter of this suit was the subject of **Mombasa High Court Civil Case No. 50 of 2016** and **54 of 2016**. The documents annexed to the Replying Affidavit confirm that through the firm of **Gikandi & Company Advocates**, the deponent herein, **Patrick Kang'ethe Njuguna** and the Interested Parties, **Edward Njuguna Kang'ethe** and **George James Kang'ethe**, sued the Defendant, the **Cooperative Bank of Kenya Limited** and **Nguru Auctioneers**, among others; and that in the two suits, applications were filed seeking temporary injunctive orders to restrain the Defendant from disposing of the suit properties, **LR No. 209/2489/22** (which is the subject of this suit) and **LR No. 209/2489/31** (which is the subject of **HCCC No. 293 of 2017**) among others, pending the hearing and determination of the two suits.

[12] There is further no dispute that the two applications were heard and a consolidated ruling delivered in respect thereof on **26 July 2016** by **Otieno, J**, whereby the applications were allowed on terms. The Court's determination was as follows:

"...I am persuaded that the plaintiffs/applicants have demonstrated merited case for the grant of a temporary injunction. I grant it to them but not at their pleasure and leisure. I impose

the following conditions.

I. Within 7 days from today the plaintiff applicant shall pay to the 1st defendant and into their account the sum of Kshs. 10,000,000 towards the reduction of the loan and pay another kshs. 10,000,000 on or before the 15th August 2016.

II. Within 14 days from today noting that their request was for accommodation upto end of July, the plaintiff shall give to the 1st defendant a clear and unequivocal acceptable proposal to liquidate the entire debt within a period not later than 90 days from today.

In default of compliance with any one of the foregoing conditions, the injunction herein granted shall stand lapsed and the 1st defendant shall be at liberty to proceed and realize the security through one appointed auctioneer. Not the three different auctioneers."

[12] Needless to say that the order aforesaid was not complied with and, as the Bank was making arrangements to dispose of the suit property as provided for in the default clause, the Plaintiffs again moved to Court vide an application dated 5 May 2017 and obtained orders on 11 May 2017 in the following terms:

"That the public auction sale of Plot Nos 209/2489/22 and 209/2489/31 scheduled for the 12th and 19th May 2017 shall not take place provided the following conditions are met:

a) Plaintiffs pay the sum of Kenya Shillings Five Million (Kshs. 5,000,000/=) to Cooperative Bank of Kenya Limited within (7) days from 11th may 2017.

b) If the said deposit is not effected, the sale scheduled for 19th May, 2017 to proceed and the sale that is scheduled for 12th May, 2017 to be re-started upon such default."

[13] The Plaintiffs in the Mombasa case were again dissatisfied with the orders of the Court and vide their Notice of Motion dated 17 May 2017, they moved the Court seeking extension of time for compliance with the orders of 11 May 2017 and offering to pay **Kshs. 1 million** immediately and to deposit the balance within 30 days. That application was allowed, but evidently not honoured by compliance. Contemporaneously, the Plaintiff had filed an interlocutory appeal to the Court of Appeal, being **Mombasa Civil Appeal No. 23 of 2017**, which apparently is also still pending hearing and final determination; and when the Bank again made an attempt to realize its statutory power of sale, **Mr. Patrick Kangethe Njuguna**, who was also the deponent in respect of the Mombasa applications, moved to Nairobi and filed this suit as well as **HCCC No. 293 of 2017**, seeking the very orders they have been pursuing in the Mombasa cases.

[14] From the foregoing, there is no doubt that the instant application is in respect of matters that have been in issue in previous suits and which have been determined by a court of competent jurisdiction, and is therefore barred by dint of **Section 7 of the Civil Procedure Act**. That provision stipulates 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.

[13] And when the plea of *res judicata* is raised as has been done herein, the Court is duty-bound to dispose of it *in limine*, as was observed by **Ringera, J** (as he then was) in **Omondi vs National Bank of Kenya Ltd & Others [2001] eKLR** thus:

"...both the objection as to the legal competence of the Plaintiffs to sue and the plea of *res judicata* are pure points of law which if determined in favour of the Respondents would

conclude the litigation and they were accordingly well taken as preliminary objections ... In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters ..."

[14] Accordingly, the question of whether or not the instant application is *res judicata* is a matter that arises as a preliminary point, and which if found tenable is capable of disposing of the entire application without going into its merits. Needless to say that the doctrine applies with equal force to applications as well. In **Uhuru Highway Development Ltd vs. Central Bank of Kenya & 2 Others [1996] eKLR** the Court of Appeal clarified this point 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..."

[15] Clearly therefore, the Plaintiff was precluded from filing a similar application seeking the same reliefs as were sought vide the applications which had been determined in the Mombasa Cases, unless it could demonstrate that new issues had since arisen. In the **Uhuru Highway Development Ltd vs. Central Bank of Kenya & 2 Others (supra)** the Court proceeded to express this principle thus:

"...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 court earlier after exercise of due diligence, which merit a re-hearing and possible departure from the previous ruling. Such cases, of course, must be very few and far in between..."

[15] There appear to be no new matters that have been raised herein. at the parties' respective circumstances are still the same. The debt remains unpaid and there can be no doubt in the circumstances that the Defendant would be entitled to realize the security in terms with the previous decisions of the Court. The only distinction raised by the Plaintiff herein is that it was not a party to either of the Mombasa Cases. However, it is instructive that in this case, just as in the Mombasa Cases, the affidavits were sworn by the same person, namely **Patrick Kangethe Njuguna**, who is also the Plaintiff in **HCCC No. 293 of 2017**. This explains the submission by Counsel for the Plaintiff that **"...The Plaintiff is a blind person and the Bank is aware of this fact. henever signed for any money..."** when the Plaintiff is indeed a limited liability company. Accordingly, it is manifest that the Plaintiff herein was litigating through the parties in the Mombasa Cases who, admittedly, are its Directors.

[16] More importantly, it is manifest that these two cases are in respect of the same properties as the Mombasa Cases, namely: **L.R. No. 209/2489/22** and **L.R. 209/2489/31**. I entertain no doubt at all that no new matters have arisen to warrant the filing of the Nairobi Cases; and even if there were, the Plaintiff would still be barred by *res judicata* for the reason that, when the Mombasa suit was filed, the Plaintiffs therein were obliged to bring forward their whole case. In **Yat Tung Investment Co. Ltd vs. Dao Hrng Bank Ltd [1975] AC 581**, this principle was expressed thus:

"Where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

[17] It is therefore untenable for the Plaintiff to file a similar application for the same reliefs which have been the subject of the Mombasa Cases; and in respect of which a court of competent and concurrent jurisdiction has pronounced itself. I would accordingly find and hold that the Plaintiff's application herein is *res judicata*. The same is hereby struck out with costs; and since the parties adopted the submissions herein in **HCCC No. 293 of 2017**, this Ruling applies with equal force to the application dated **13 July 2017**, filed therein by **Mr. Patrick Kangethe Njuguna**.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2017

OLGA SEWE

JUDGE