



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL DIVISION

CIVIL SUIT NO. 88 OF 2011

NDUNGU WAWERU.....PLAINTIFF/RESPONDENT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT/APPLICANT

RULING

The Application

1. By its Notice of Motion dated 31.12.2013, the applicant/Defendant prays for orders that this suit be struck out and that costs of the application and those of the suit be paid by the plaintiff. The application is premised on the three grounds set out on the face thereof namely that the suit is res judicata, that the suit is an abuse of the process of the court and that the suit has been over taken by events.
2. There is also a supporting affidavit dated 31.12.2013 sworn by Damaris Wanjiku Gitonga, the then Defendant's Ag. Head of Legal and Remedial Division. The deponent reiterates the grounds set out on the face of the application and urges this court to allow the application with costs.
3. Though served, the plaintiff did not file any response to the application, so when the same came up for interparties hearing on 11.7.2017, the court allowed the applicant to proceed, the plaintiff's absence notwithstanding.

Background

4. From the supporting affidavit and the rulings in this suit (By Hon. Mr. Justice Kimaru on 20.09.2011) and by Hon. Lady Justice Wanjiru Karanja J (as she then was) the defendant's application for injunction was dismissed on the grounds that the defendant was truly indebted to the defendant and secondly for reason that the application for injunction was overtaken by events since the suit property namely Kakamega/Kongoni/624 and Kakamega/Kongoni/802 had already been sold. The ruling by Hon. Lady Justice Wanjiru Karanja was given in Kitale HCCC No. 44 of 1998 in which the defendant herein was the plaintiff and the plaintiff was the defendant. The court entered summary judgment for the defendant herein plus costs of the application and of the entire suit. The defendant therein did not appeal the ruling which was delivered in January 2005 but instead came to this court and filed his claim on 15.07.2011 seeking the following reliefs:-

- a) Permanent injunction restraining the defendant and or its servants and agents from selling by auction Land title numbers Kakamega/Kongoni/624 and Kakamega/Kongoni/802.

b) An order discharging the charges over land title numbers Kakamega/Kongoni/624 and Kakamega/Kongoni/802/

c) costs of this suit

d) Any other relief this honourable court may deem fit to grant.

5. By his application dated 14.07.2011 the plaintiff sought to restrain the defendant from selling by public auction the parcels of land known as LR No. Kakamega/Kongoni/624 and Kakamega/Kongoni/802. This was the application dismissed by Justice Luka Kimaru on 20.09.2011 for being devoid of merit since the suit property referred to above had already been sold.

Submissions

6. As indicated earlier in this ruling the instant application preceded *ex parte*. During the oral submissions, Miss Nyangano, holding brief for Mr. Omayo for the Defendant/Applicant reiterated the grounds on the face of the application and the averments contained in the supporting affidavit. Counsel highlighted the fact that the instant suit is *res-judicata* by reason of the ruling in Kitale HCCC No. 44 of 1998 in which the subject matter and the parties were the same and in which the suit was decided in favour of the defendant/applicant herein. Counsel further submitted that the subject matter no longer belongs to the defendant/applicant, the same having been sold by public auction to one Richard Kubondi Maina on 22.07.2011 after the plaintiff herein defaulted in loan repayments. On 21.09.2012 and 26.06.2012 title deeds were issued to the said. Richard Kubondo Maina in respect of land parcels Kakamega/Kongoni/624 and Kakamega/Kongoni/802 respectively.

Determination

7. After careful consideration of the facts of this case, the grounds in support of the application and the submissions made before this court, I am satisfied that the application has merit and ought to be allowed, the reasons being that the matter is truly *res-judicata* and secondly that the substratum of the plaintiff's claim against the defendant no longer exists. For the first limb of my finding, I rely on Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya which provides:-

“7. 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.”

8. There is no doubt that the issue in this matter was finally decided by the High Court in Kitale in January 2005. The plaintiff, as defendant in the Kitale suit did not file any appeal against the judgment of the learned trial court. In any event there is clear evidence that the suit property has already been sold to third parties.

9. For the reasons above stated, the Notice of Motion dated 31.12.2013 be and is hereby allowed as prayed. This suit be and is accordingly struck out with costs of the application and those of the entire suit to the defendant/Applicant.

It is so ordered.

Ruling delivered, dated and signed in open Court at Kakamega this 20th day of September 2017

RUTH N. SITATI

JUDGE

In the presence of

Miss Nyanyano for Omaye.....for Defendant/Applicant

N/A.....for Plaintiff/Respondent

Polycap.....Court Assistant.