



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 483 OF 2011**

**DAVID KARIUKI GATHUMBI :::::::::::::::::::: 1ST PLAINTIFF**

**ARLINGTON CONSTRUCTION CO. LTD. :::::::::::::::::::: 2ND PLAINTIFF**

**VERSUS**

**EQUITY BANK LIMITED :::::::::::::::::::: 1ST DEFENDANT**

**EVANSON KAMAU WAITIKI :::::::::::::::::::: 2ND DEFENDANT**

**ROBERT WAWERU MAINA**

**T/A ANTIQUE AUCTIONS AGENCIES :::::::::::::::::::: 3TH DEFENDANT**

**R U L I N G**

**INTRODUCTION**

1. The **Notice to Motion** before the court is dated **18th August 2014** seeking the following orders:-
  1. *The application be certified as urgent and heard ex-parte in the first instance.*
  2. *That pending the hearing and determination of this application, a temporary injunction be issued to stop and restrain the 1st Defendant herein whether acting by itself or through their agents, the 2nd Defendant M/s Robert Waweru Maina T/A Antique Auctions or other servants or anybody acting on its instructions from selling the Plaintiff's property title number LR. No. KIAMBAA/KARURU/T380.*
  3. *Pending the hearing and determination of this suit, a permanent injunction be issued to stop and restrain the 1st Defendant's herein whether acting by itself or through their agents, the 2nd Defendant M/s Robert Waweru Maina T/A Antique Auctions or other servants or anybody acting on its instructions from selling the Plaintiff's property title number LR. No. KIAMBAA/KARURU/T380.*
  4. *Costs of this application be provided for.*
2. The application is premised on the several grounds set out therein and is supported by affidavit of the Plaintiff dated **19th August 2014**. The 2nd Plaintiff and the 2nd Defendants do not oppose the application, which is mainly an issue between the 1st Plaintiff and the 1st Defendant. The 1st Defendant in opposition of the application filed a **Notice of Preliminary Objection** on **17th September 2014** as well as a replying affidavit by sworn by Janet Muthee dated 16th September 2014.
3. In brief, the story behind the application is that there have been proceedings in this matter filed by the Plaintiff seeking injunctive orders against the sale of suit property by the 1st Defendant. One

- such application for injunction orders was dismissed by this court on 19th May 2011 by Hon. Justice Okwengu's Ruling of even date. The second application dated 15th August 2011 was dismissed by Justice Mutava on 21st June 2012. The current application seeks the same orders, and on the face of the record, it is clear that the issue is *res-judicata*.
4. The 1st Defendant's Preliminary Objection states that the court lacks jurisdiction to hear and determine the Plaintiff's application which is *res-judicata* and contravenes the mandatory provisions of Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya as the issues raised therein have been heard and determined by this court in its Ruling of 21st June 2012 by Hon. Mr. Justice Mutava and further by this court in its Ruling of 19th May 2011 by Hon. Lady Justice Okwengu in the High Court Civil Case 809 of 2010 and in the Kiambu Chief Magistrate Court Civil Suit 210 of 2012 in the Ruling by Hon. C.C. Aluoch P.M. of 17th April 2013.
  5. The court directed the parties to file written submissions to the application. The 1st Defendant did that on 28th October 2014 while the Plaintiff failed to comply and instead relied on the filed pleadings.
  6. I have considered the pleadings and the 1st Defendant's submissions. The only issue for this court to determine is whether or not the current application is *res-judicata*.
  7. To do the above I have to look at the history of the application and the suit. Following the dismissal of an application for an injunction in the case of HCCC No. 809 of 2010 between the same Plaintiffs and the same Defendant Equity Bank Limited by the Hon. Lady Justice Okwengu, the Plaintiffs filed this instant suit along with an application brought under Certificate of Urgency. See annexure AA1 appended to the replying affidavit filed by the 1st Defendant/Respondent. The Plaintiffs did not appeal against that particular Ruling.
  8. The Plaintiffs filed along with the Plaintiff, an Notice of Motion application dated 15th August 2011 seeking *inter-a-alia*, that the Defendants be restrained by an order of injunction from disposing the charged property parcel number KIAMBAA/KARURI/T.380 pending the hearing of the application and the suit.
  9. The 1st Defendant filed a written statement of defence dated 2nd November 2011 and a replying affidavit sworn on 1st November 2011 by one Purity Kinyanjui, who is the Head of Debt Recovery Unit Department of the Defendant Bank, and further, a Supplementary Affidavit sworn by the said Purity Kinyanjui on 30th March 2012. That application was heard and determined on merit and the Hon. Mr. Justice Mutava delivered a ruling on the said application on 21st June 2012. The Plaintiff's Applicant's application was dismissed. See annexure AA2 appended to the replying affidavit filed by the 1st Defendant/Respondent. The Plaintiffs did not appeal against the Ruling of this court at that point in time.
  10. The 1st Plaintiff thereafter moved to the Chief Magistrate Court at Kiambu and filed an application dated 3rd October 2012. They obtained some interim orders. The application was heard and determined on merit and the application was dismissed. The Plaintiffs have not appealed against any of the Rulings mentioned above. A cursory look at the issues raised in the current application as well as the previous applications show that the issues raised in these both applications are the same. It is surprising that the Plaintiffs have filed the application currently dated 18th August 2014 seeking the same relief. The Plaintiff's action is barred by statute, and in particular, Section 7 of the Civil Procedure Act provides that the court shall not 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 claim or any of them claim, litigating under the same title in a competent court to try such subsequent suit or the suit in which the same issue has been subsequently raised and has been heard and finally decided by such court.
  11. It is the 1st Defendant's submission that by virtue of the above cited provisions the court cannot hear and determine the application in view of the fact that this court has already heard and determined that application. The Court of Appeal: Visram, Koome & Odek JJA in the case of **Nicholas Njeru - Vs - The A.G. & 8 others [2013] e KLR** on the issue of *res judicata* stated as follows at paragraph 26 of their judgement. "***The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that the individual should not be harassed twice on the same account of litigation.***"
  12. From the foregoing paragraphs of this Ruling, it is clear that the current application is *res-judicata*.

It is also clear that the application is an abuse of the process of this court and lacks merit.

13. The order that commends itself to this court is that which dismisses the Plaintiff's/Applicant's application dated 18th August 2014 with costs to the 1st Defendant.

14. In the upshot I make orders as under:-

a. ***The application is dismissed.***

b. ***Costs herein assessed at Kshs.30,000/= shall be paid to the 1st Defendant within 7 days of this Ruling, failure whereof the Plaintiff shall not file any pleadings in this matter until the said costs are paid.***

Orders accordingly.

**READ, DELIVERED AND DATED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Mr. Gachugi holding brief for Kariuki for 1st Defendant/Respondent

No appearance for Plaintiff/Applicant

Teresia – Court Clerk