



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 141 OF 2014

SAMUEL GICHERU NJORA.....PLAINTIFF

=VERSUS=

EQUATORIAL COMMERCIAL BANK.....1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS.....2ND DEFENDANT

R U L I N G

Introduction:

1. The Preliminary Objection by the Defendants is dated 20th June 2014. In the said Preliminary Objection, the Defendants have averred as follows;
 - (a) Pursuant to the provisions of Section 6 of the Civil Procedure Act read together with Section 8 of the same Act, this Honourable Court does not have jurisdiction to entertain this matter in view of the fact there is an earlier filed case namely Malindi ELC No. 133 of 2013 between the parties herein over the same subject matter namely sale by auction of the Applicant's land known as LR. NO. 215/SECTION III MAINLAND NORTH which is still pending before the Malindi Environment and Land court.
 - (b) The Application before the court is res judicata pursuant to the provisions of Section 7 of the Civil Procedure Act considering that the Applicant filed a similar application in the aforesaid case ELC No. 133 of 2013 which was heard by the Malindi Court and a ruling delivered by Justice Angote on 24th February 2014 and as such this Court does not have jurisdiction to hear this case.
2. The Defendants' advocate submitted that the Plaintiff herein filed another case, namely Malindi ELC Number 133 of 2013 wherein he filed an Application dated 5th August 2013 which was fully heard and a Ruling delivered dismissing the Application.
3. While ELC Number 133 of 2013 was pending, it has been submitted that the Plaintiff filed the current suit in Mombasa; that the filing of this suit in Mombasa is an abuse of the court process and that the court has powers to strike out proceedings that appear on the face of it to amount to abuse of the court process.
4. The Defendants' counsel further submitted that the Notice of Motion dated 3rd June 2014 is res judicata because a similar application was heard and determined in Malindi ELC NO. 133 of 2013.
5. The Plaintiff's counsel submitted that the court having dismissed the Application for injunction in

- Malindi ELC No. 133 of 2014, there was nothing to litigate in that suit since all the prayers were determined by the Application; that the complaint in the current suit is that the Plaintiff was tricked by the Defendant that the sale was completed on 7th May 2014, whilst the same property was advertised for sale on 4th June 2014 and that this suit is challenging the process used by the Defendant to exercise its power of sale.
6. Counsel submitted that the cause of action in this suit is premised on Section 97 of the Land Act and does not violate the provisions of Section 6 of the Civil Procedure Act.
 7. Counsel further submitted that the issue in the current suit is whether the sale of the suit property was illegal and void, which issue has not been resolved; that the Preliminary Objection does not meet the threshold set by the case of **Mukhisa Bincuits Vs West End Distributors** and that there is no point of law which has been raised.

Analysis and findings:

8. The issue for determination is whether this suit raises issues which are also directly and substantially in issue in Malindi ELC No. 133 of 2013 and whether the application dated 3rd June 2014 is res judicata.
9. The two issues are purely matters of law which the court should determine by looking at the Plaints and the Application in the two suits. Consequently, the Preliminary Objection is properly before this court.
10. I will begin by determining whether the Application dated 3rd June, 2014 is res judicata.
11. The Application dated 3rd June 2014 is seeking for an order of temporary injunction restraining the Defendant from selling by public auction land known as L.R.NO.215 Section III MN pending the hearing of the suit.
12. In the Application that was filed by the Plaintiff against the Defendant in Malindi ELC NO. 133 of 2013, the Plaintiff sought for an order of injunction to restrain the Defendants from proceeding with the intended sale by public auction scheduled for 12th August 2013 pending the hearing of the suit.
13. The Plaintiff is now seeking for a similar order of injunction in a separate suit. That, in my view, is an abuse of the court process.
14. If the Plaintiff was dissatisfied with the Ruling of this court dismissing his Application for an order of injunction, he should have proceeded to file and argue an appeal instead of filing another Application in Mombasa seeking for the same order that this court had declined to grant him.
15. It is trite law that the doctrine of res judicata applies to both suits and Applications (**see Uhuru Highway Development Ltd Vs Central Bank of Kenya and 2 others Civil Appeal No. 36 of 1996**)
16. For these reasons, I find and hold that the Plaintiff's Application dated 3rd June, 2014 is res judicata and the same is hereby dismissed with costs.
17. The next issue that I am supposed to determine is whether this suit raises the same issues that have been raised in Malindi ELC No. 133 of 2013
18. The Plaintiff has pleaded at paragraph 9 of the Plaint that the sale schedule for 4th June 2014 (past) is aimed at defeating the Plaintiff's equity of redemption according to Section 97 of the Land Act.
19. The orders that the Plaintiff is seeking are for a declaration that the purported sale of LR NO. 215/MN/Section III on 7th April 2014 be declared null and void; the Plaintiff be allowed to exercise his right to redeem the property and damages arising from the 1st Defendant's wrongful exercise of its right to realise the security.
20. Having declined to stop the sale of the suit property by way of public auction, the two substantive prayers in the current suit are for a declaration that the sale of the suit property be declared null and void and for damages arising from the 1st Defendant's wrongful exercise of its rights to realise the security.
21. The two substantive prayers emanate from the provision of Section 97(1) of the Land Act.
22. The said section obligates the Defendant while exercising its statutory power of sale to obtain the best price reasonably obtained at the time of sale.
23. Section 97(3)(b) of the Land Act states that the chargor whose land is being sold may apply to a

- court for an order that the sale be declared void if the price at which the charged land is sold is 25% or below the market value.
- 24.The prayers in HCCC No. 133 of 2013 were only limited to a permanent injunction restraining the Defendant from proceeding with the sale by public auction.
- 25.Consequently, it cannot be said that the matters in issue in this suit are also directly and substantially in issue in HCCC No. 133 of 2013. The prayers in the two suit are distinct. In fact, if indeed the suit property has already been sold, HCCC No. 133 of 2013 will be moot and should be withdrawn altogether.
- 26.For those reasons, I find and hold that the Defendant's Preliminary Objection only succeeds in so far as the Plaintiff's Application dated 3rd June, 2014 is concerned.
- 27.Consequently, I dismiss the Application dated 3rd June, 2014 with costs.

Dated and delivered in Malindi this **20th** day of **February**, 2015.

O. A. Angote

Judge