REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 315 OF 2007

NYALI CONSTRUCTION & ELE……. ……..……...…… PLAINTIFF

V E R S U S

BARCLAYS BANK LIMITED……... ……DEFENDANT

RULING

1. NYALI CONSTRUCTION & ELECTRICAL SERVICES LIMITED, the plaintiff by its Notice of Motion dated 11th September 2014 sought the sale by private treaty on public auction of property L.R. No. MOMBASA/BLOCK/1/28 (the property) by BARCLAYS BANK OF KENYA LTD, the defendant, to be suspended and status quo be maintained. When the Notice of Motion was presented before court on 11th September 2014 the court granted interim orders as prayed, Which order had the essence of cancelling the schedule auction of the property. The auction was scheduled on 19th September 2014.

BACKGROUND

2. The present application is not the plaintiff's first application seeking to stop the sale of the property which is charged to the defendant. The plaintiff filed a chamber summons dated 11th December 2008. The plaintiff was granted interim exparte injunction which restrained the defendant from selling by public auction the property. However at inter partes hearing of that chamber summons the defendant raised a preliminary objection. That objection was to the effect that the plaintiff had failed to make full material disclosure, thus dis-entitling it to the injunction it sought. The material non disclosure raised by the defendant related to plaintiff's statement that it had not charged its property to the defendant. The offending paragraph of the plaintiff's affidavit that the defendant relied upon to raise its objection was to the following effect:

> **"That I aver that no charge was created by the plaintiff over the suit property as the plaintiff had not as at the time it acquired the suit property. Accordingly, I verily believe that the suit property did not secure any Liability whatsoever."**

The court in its ruling of 23rd June 2008 found that the contents of that paragraph of the plaintiff's affidavit to have contained material non disclosure. This is what the court stated in that Ruling, it stated:

> **"Exhibited in the affidavit of Pius Okello, is a copy of a letter dated 29th January 2002 in which the plaintiff wrote to the defendant requesting the transfer of the suit premises to the plaintiff from the directors while retaining the charge in favour of the defendant. The same was confirmed by the letter of the same date authored by A.A. Amadi. These**

> **two letters were not disclosed to this court. The property was transferred to the plaintiff from Clement Otieno Okumu and Benjamin Olayo Kisimba subject to a charge of 9/8/1995 executed by Clement Okumu and Benjamin Kisimba. In the end I must uphold the preliminary objection. I find the plaintiff guilty of material non-disclosure. Having come to that conclusion, I do not need to consider the other grounds."**

The Learned Judgment in that Ruling proceeded to rely on the cases **R-V- KISSINGTON INCOME TAX COMMISSIONER** [1917] which held that when a party appearing before court, exparte, bore an obligation to the court to make the fullest possible disclosure of all material facts.

3. Plaintiff appeal against that dismissal of its chamber summons. Pending the hearing of that appeal the plaintiff sought an injunction pending the hearing of the appeal to restrain the defendant from selling the charged property. The court of appeal by its Ruling of 12th march 2010 in Civil Application No. NAI 201 of 2008 dismissed that application on the grounds that the defendant would not have difficulties in paying damages to the plaintiff in the event the plaintiff was successful in its appeal.

4.The defendant re-scheduled the auction of the property but the same was stopped this court by its Ruling, in this case, of 27th July 2009. The ground upon which the court issued that injunction was because the defendant had intended to sell the property on a date not reflected in the newspaper advertisement.

5. The defendant being aggrieved by that injunction sought and obtained a review of the injunction order by this court's Ruling of 6th November 2009. In reviewing the injunction order the court stated:

> **"It is plain therefore that, injunction was to retrain the defendant, its agents and or servants from doing any of the acts complained of on the basis of the defective advertisement. There was no other impediment to the defendant's otherwise lawful exercise of its statutory power of sale. There is none even now, the plaintiff's application for injunction having been dismissed by Sergon J."**

6. That is where the matter rested until the defendant re-advertised for public auction of the property on 19th September 2014.

NOTICE OF MOTION DATED 11TH SEPTEMBER 2014

7. The application is opposed by the defendant on the ground that it offends the doctrine of res judicata. The defendant, in a very voluminous further affidavit provided the court with copies of all previous applications that have been before courts relating to this dispute and their supporting affidavits and annextures.

8. There are two issues that the plaintiff raised by its present application upon which it founds the prayer to restrain the defendant from auctioning the property.

9. The first issue is that the defendant has breached the provisions of section 44 (a) of the banking Act, Cap 488. Plaintiff's submission was that the defendant was in breach of the in duplum rule as provided in section 44. The in duplum was discussed in by Nganunu CJ of Botswana in the case **BARCLAYS BANK OF BOTSWANA LTD –V- MPUISANG 200 (1) BLR 481 (HC)** Viz:

> **"It is clear law, as laid down by the Full Court in this Division, that when an amount of arrear interest reaches the amount of the capital, interest ceases to run. It is merely that the excess of interest over an amount equal to the amount of the capital is irrecoverable. There can never be more interest accumulated than an amount equal to the capital sum. (Union Government V. Jordan's Executor (1916 T.P.D. 411)."**

Plaintiff attached various statements account to advance its submission that the defendant breached the provisions of section 44.

10. The second issue raised by the plaintiff in support of its application is that the charge instrument is invalid having been prepared by an advocate who was then not holding a practicing certificate contrary to section 9 of the Advocates Act, cap 16.

11. As stated before the defendant opposed the application on the ground that the same is res judicata. Section 7 of the civil Procedure Act, Cap 21 provides as follows:

> **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.**

12. The defendant submitted that the prayers in the present Notice of Motion are duplicate of the prayers in the plaintiff's former application. Defendant cited the case **UHURU HIGHWAY DEVELOPMENT LTD –VS- CENTRAL BANK OF KENYA & 2 OTEHRS CIVIL APPEAL NO. 36 OF 1996** Viz:

> **"There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature… That is to say, 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."**

ANALYSIS AND DETERMINATION

13. I have considered the parties affidavit evidence, their submissions and authorities. To determine whether the plaintiff's application is caught by the doctrine of res judicata one has to carefully consider section 7 of cap 21 and also consider the previous Rulings delivered in this matter.

14. Indeed the first application dated 11th December 2007 filed by the plaintiff, to which the Ruling of 23rd June 2008 was delivered, raised the issue of the invalidity of the charge, amongst others. The court by its Ruling of 23rd June 2008 did not in any way delve into those issues except one. The court found the plaintiff was guilty of material non disclosure when it stated the defendant had not granted it a loan facility. On that basis alone the court dismissed that application.

15. The second application dated 23rd July 2009 alluded to the dismissal of the first application and to the then pending appeal against that dismissal. Again in this second application the plaintiff referred to the charge which it alleged to be invalid and also relied on the ground that the defendant intended to sell the charged property on a date not stated in the newspaper advertisement. The court granted an injunction on the basis that the sale of the property could not proceed on a date not stated in the advertisement. That injunction as stated before, was later discharged on the defendant's application.

16. The plaintiff moved to the court of appeal by its third application dated 23rd July 2008 seeking an injunction pending appeal over the Ruling of 23rd June 2008. The court of appeal did not delve into the appeal itself and proceed to dismiss the application on the ground the defendant could compensate the plaintiff if the plaintiff finally succeeded in its appeal.

17. In my view, and it is obvious from the outline I have set out under this analysis that the two issues raised in the present application, namely the violation of the duplum rule and the invalid charge, have not in the three previous applications been heard let alone determined. It is on that ground alone that the present application fails the test of res judicata as set out in section 7 of cap 21.

18. Further I am of the view that an application, perhaps particularly in the case of injunction applications seeking to restrain a party from auctioning property may be filed more than once. This is because although an injunction application may be dismissed the subsequent auctions may violate the law and such violation can be basis of a subsequent applications. Such subsequent applications would not offend the doctrine of res judicata because they would be on an issue not determined previously. It follows therefore that dismissal of application does not always necessarily "shut the door" to the seat of justice for an application. In this regard I am persuaded by the decision of Justice O.A. Angote in the case Enock Kirao Muhanji v Hamid Abdalla Mbarak [2013]eKLR where he stated thus

> **"It is true, as argued by the Applicant that when a suit is dismissed, one might not be allowed to file a fresh suit unlike in a situation where a suit has been struck out. The words "dismissed" and struck out" are terms of art and are not supposed to be used interchangeably in a Ruling or Judgment. However, more often than not, the terms are used interchangeably by the litigants and the courts.**
>
> **It is therefore incumbent that when the court is called upon, like in this case, to determine whether a party can file a fresh suit after the first one has been dismissed or struck court, the court should look at the circumstances of each case to arrive at a decision. The mere fact that the trial court uses the words "dismissed" does not expressly mean that a fresh suit cannot be filed if indeed the court meant that the suit should have been "struck out' so as to allow a party to file a fresh suit.**
>
> **For me to determine if the current suit is *res judicata*, the only question that I have to ask myself is whether the issues which were before the lower court between the Plaintiff and the Defendant herein were determined by the court.**
>
> **The issue as to the ownership of parcel of land number Kilifi/Township/Block III/1095 was never heard and determined by the Magistrate in the lower court."**

I wholly agree with that finding of the Learned Judge

19. Further in the case Nancy Mwangi T/A Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others [2014] eKLR it was stated:

> **"Is this case res judicata? Unless it is abundantly clear, when *res judicata* is raised, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings-of the previous case and the instant case-to ascertain; 1) what issues were really determined in the previous case; and 2) whether they are the same in the subsequent case and were covered by the decision of the earlier case."**

20. In this case and in particular the application before me I do find that the same does not offend the doctrine of res judicata.

21. The fact also that the plaintiff has filed other application previously for injunction, which application was dismissed is not a bar to plaintiff filing subsequent applications. This was clearly stated in the judgment of Kwach J.A. (as then was) in the case **UHURU HIGHWAY DEVELOPMENT LTD –V-CENTRAL BANK OF KENYA AND TWO OTHERS CIVIL APP. NO. NAI 140 OF 1995** where rthe Learned judge quoted from a passage from Halsbury's Laws of England Vol. 24 4th edition v paragraph 1112 viz:

> **"A plaintiff may not support the injunction by showing another state of circumstances in which he would be entitled to it, but if he has obtained an ex-parte injunction which is afterwards dissolved on the ground of concealment of facts, he is not precluded from making another application on the merits. It is not excuse for a party to say that he was not aware of the importance of the facts which have not been brought to the notice of the court, or that he had forgotten**

> **them, but mere ignorance of what a party might have known is not equivalent to concealment so as to amount conduct."**

22. Having determined that the present application does not offend the doctrine of res judicata and having also determined that there is no abuse of the court process in filing the same I will proceed to consider the two issues raised by the application. On considering those two issues I am aware that I should avoid making final determination of the same because what is before me is an interlocutory application. This duty was made clear in case MBUTHIA –V- JIMBA CREDIT FINANCE CORPORATION & ANOTHER (1988) KLR Page 1, as follows:

> **"The correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each sides's propositions. The lower court judge in this case had gone far beyond his proper duties and made final findings of fact on disputed affidavits."**

23. With the above caution in mind and because the defendant did not specifically respond to the allegation of violation of section 44 (a) of cap 488 and the allegation of invalidity of the charge I do on prima facie basis find that the plaintiff has shows in respect to those issues a prima facie case with probability of success and is therefore deserving the orders it seeks. The plaintiff in particular annexed a letter authored by the law Society of Kenya which seems to confirm that the advocate who drew the charge instrument did not hold a practicing certificate during that relevant period. The effects of a finding, after the trial, that indeed the advocate did not hold a practicing certificate as alleged will be catastrophic to the charge instrument. The plaintiff must be afforded an opportunity to lead evidence on that.

24. In that end I grant the following orders:

a. **An order is hereby issued restraining the defendant, its servants or agents or anyone acting on its behalf from selling by auction or private sale or any other way the property title MOMBASA/BLOCK 1/28.**
b. **The costs of the Notice of Motion dated 11th September 2014 shall be in the cause.**

DATED and DELIVERED at MOMBASA this 30TH day of JULY, 2015.

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

C/A Kavuku

For Plaintiff:

For Defendant:

Court

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE