



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**ELC CASE NO. 118 OF 2015**

**MARGARET NJOKI MIGWI.....PLAINTIFF/APPLICANT**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

If another example is needed of what amounts to abuse of the Court process, then the proceedings herein will serve as yet a further perfect example.

On 17<sup>th</sup> October 2011, the plaintiff herein filed this suit at the High Court Embu seeking the following remedies against the defendant/respondent.

- a. *A declaration that the defendant advertised sale without notice to the plaintiff of the plaintiff's property Title No. GATURI/GITHIMU/1794, DALLAS ESTATE EMBU scheduled for 19<sup>th</sup> October 2011 is illegal, irregular and unlawful.*
- b. *That the defendant be permanently enjoined by themselves, their servants or agents from selling, alienating, interfering or in any other way whatsoever dealing with the plaintiffs Title No. GATURI/GITHIMU/1794 DALLAS ESTATE EMBU.*
- c. *That the defendants do pay the costs of this suit.*

Simultaneously with that plaint, the plaintiff/applicant filed a Notice under Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act seeking the following substantive reliefs:-

1. *Spent*
2. *That the defendants, themselves, their servants or agents be and are hereby restrained from selling, disposing, alienating, interfering or in any other way whatsoever dealing with the plaintiffs property Title No. GATURI/GITHIMU/1794 DALLAS ESTATE EMBU pending the hearing and determination of this application.*
3. *That the defendants, themselves, their servants or agents be and are hereby restrained from selling, disposing, alienating, interfering or in any other way whatsoever dealing with the plaintiff's property No. GATURI/GITHIMU/1794 DALLAS ESTATE EMBU pending the hearing and determination of this suit.*
4. *That the costs of this application be provided for.*

That application was placed before Ong'udi J. who issued orders on the same day in terms of prayer 2 and set the inter-parte hearing for 31<sup>st</sup> October 2011.

On 31<sup>st</sup> January 2012 having heard counsels for both parties, Ong'udi J. delivered a ruling in which she found that the only issue was not the indebtedness of the applicant, but whether a statutory

notice had been served upon her to redeem her property before it was put up for sale. In her plaint filed herein, the plaintiff/applicant had pleaded that she had offered as security to the defendant/respondent the title to her property No. GATURI/GITHIMU/1794 situated within DALLAS ESTATE EMBU (herein the suit property) for a loan facility of Ksh. 5,120,000/= but a dispute arose over who should pay the stamp duty amounting to Ksh. 391,070/= and on 14<sup>th</sup> October 2011, she was informed that Garam Auctioneers were preparing to sell the suit property on 19<sup>th</sup> November 2011 yet she had not been served with a notice as per **Section 69 (A)(1) of the Transfer of Property Act**. In granting the injunction Ong'udi J. found that the Statutory Notice had in fact been served upon the plaintiff/applicant. The Judge then asked herself if the applicant had demonstrated that she would suffer irreparable injury/loss if the suit property is sold and answered the question in the affirmative thereby granting the plaintiff/applicant a temporary injunction in terms of prayer 3 of her application to last only 60 days so that she could get a buyer for the property or pay the loan.

I can see from the record that an amended plaint was filed on 27<sup>th</sup> August 2014 in which the plaintiff/applicant was now pleading that the charge executed over the suit property was null and void because it was not attested by an advocate and further, there was no compliance with the mandatory provisions of **Section 74 of the now repealed Registered Land Act**. Apart from the mandatory injunction sought in the initial pleading, the plaintiff/applicant also sought a declaration that the charge executed on 13<sup>th</sup> May 2009 between her and the defendant was null, void and un-enforceable and she therefore sought an order that the title documents to the suit property be released unconditionally.

On 22<sup>nd</sup> May 2012, the plaintiff/applicant by her Notice of Motion dated 21<sup>st</sup> May 2012 filed another application for injunction restraining the defendant/respondent from selling the suit property.

She also sought an order to extend by a further 180 days the orders earlier issued by Ong'udi J. on 31<sup>st</sup> January 2012. That application was placed before Mabeya J. on 23<sup>rd</sup> May 2012 who not only issued further injunctive orders but also extended the period of 60 days to 180 days. The public auction of the suit property that was due on 24<sup>th</sup> May 2012 was suspended. He also directed that the application be heard inter-parte on 4<sup>th</sup> June 2012. It would appear from the record that the defendant/respondent advertised for the sale of the suit property on 18<sup>th</sup> July 2012 and so the plaintiff/applicant moved to Court and Ong'udi J. ordered that the status quo be maintained till 20<sup>th</sup> July 2012 when that application would be heard but ordered the plaintiff to pay the Auctioneer's charges.

On 14<sup>th</sup> August 2013, the plaintiff/applicant filed yet another application dated 12<sup>th</sup> August 2013 seeking the extension of the orders issued by Mateya J. pending the ruling that was to be delivered by Ong'udi J. on the application dated 21<sup>st</sup> May 2012. The defendant/respondent responded by its own application also filed on 14<sup>th</sup> August 2013 seeking orders that the plaintiff/applicant, her agents, servants or advocates be restrained from seeking injunctive reliefs or in any manner whatsoever from interfering with the public auction in respect of the suit property scheduled for 16<sup>th</sup> August 2013. That application was premised on the grounds, inter alia, that the plaintiff/applicant has always frustrated the defendant/respondent Bank from realizing the security, by abusing the Court process and by not complying with the directions of the Court that gave her 60 days to look for a buyer. It is not clear if the defendant/respondent's application filed on 14<sup>th</sup> August 2013 was canvassed. However, the plaintiff/applicant's application also filed on the same day was considered by Ong'udi J. who dismissed it with costs vide her ruling dated 15<sup>th</sup> August 2013.

The plaintiff/applicant did not relent. On 27<sup>th</sup> August 2013, she filed yet another application seeking to restrain the defendant/respondent from selling the suit property by public auction that was scheduled for 29<sup>th</sup> August 2013. Again Ong'udi J. stopped the auction temporarily and scheduled that application to be heard at Kerugoya Court on 3<sup>rd</sup> September 2014. On that day the parties appeared before Githua J who

extended the interim orders and fixed the matter for mention at Embu High Court on 16<sup>th</sup> October 2014 for directions.

On 17<sup>th</sup> June 2015 the matter was placed before Muchemi J. where counsels for both parties addressed her and persuaded her that this matter ought to be transferred to the Environment and Land Court at Kerugoya as her Court has no jurisdiction over the matter. By a ruling delivered on 17<sup>th</sup> June 2015, Muchemi J. wondered why the issue of jurisdiction had never been raised before. She nonetheless agreed that she had no jurisdiction as this is a land matter and ordered it be transferred to this Court. She also ordered that any orders issued by the High Court after the establishment of the Environment and Land Court were null and void as they were made without jurisdiction.

On 17<sup>th</sup> September 2015, the plaintiff/applicant filed another application for injunction seeking to restrain the defendant/respondent from selling the suit land pending the hearing of this suit. When the parties' counsels appeared before me on 18<sup>th</sup> September 2015 I directed that the application be canvassed before me orally. That was done and is the basis of this ruling.

May I begin with the suggestion that the High Court had no jurisdiction in this matter and that therefore, all the orders made in this case after the establishment of the Environment and Land Court were made without jurisdiction and are null and void. I do not think so. In my view, the plaint as drawn relates to banking transactions between the plaintiff/applicant and the defendant/respondent and raises issues as to whether the defendant/respondent's statutory powers of sale have arisen. The charging of the plaintiff/applicant's suit property as security is really secondary to the main action being that of a banking

transaction. By offering the suit property as security for the loan of Ksh. 5,120,000,000/=, the plaintiff/applicant was treating it like a commodity that the defendant/respondent could dispose of so as to recover the loan and interest due to it. It therefore became, for all intent and purposes, a commercial transaction and I do not see why counsels were of the view that Muchemi J. had no jurisdiction to deal with the matter when clearly the matter had all along been handled by the High Court. It is my considered opinion that the orders issued by both Ong'udi J. and Mabeya J. were perfectly within their jurisdiction and it was therefore not necessary to declare them null and void. In any case, there was no application filed seeking to declare them so.

Having said so, does that mean that this Court lacks the jurisdiction to hear this case? Counsels for both parties were of the view that this is the proper forum hence the transfer to this Court. I am of course aware about the Court of Appeal decision in the case of

**KARISA CHENGO & TWO OTHERS VS REPUBLIC C.A CIVIL APPEAL NO. 44, 45 and 76 of 2014 (MALINDI)** where the Court declared criminal proceedings handled by a mixed bench of an Environment and Land Court Judge and a High Court Judge to be a nullity and ordered a re-trial. The circumstances in that case are different from this case for various reasons. Firstly, the **KARISA CHENGO** case (supra) was a criminal matter handled by a mixed bench of Environment and Land Court and High Court Judges and the appellant therein challenged the Court's jurisdiction. This case now before me involves a commercial transaction that touches on land and which has been placed before the Environment and Land Court. Secondly, both counsels have no objection to this Court handling the dispute and infact moved for the transfer of the case to this Court. Of course consent by the parties does not confer the Court with jurisdiction. However, it would not be a proper use of judicial time to keep transferring this case from one Court to another. The parties have opted for this forum to settle their dispute and this Court will oblige and serve justice as requested. A game of ping pong in which files shuttle between two or three Courts is not in keeping with the overriding objective of the Court's which is the just, efficient and expeditious disposal of cases before it. It is in light of the above that this Court will determine the application before it on its merits.

Both Mr. Mutua for the plaintiff/applicant and Mr. Kimani for the defendant/respondent addressed me orally on the application dated 17<sup>th</sup> September 2015. I have considered their submissions and the cases cited as well as the history of this case which I have summarized above.

Mr. Kimani raised the issue that this application is res-judicata and referred me to three (3) other similar applications dated 14<sup>th</sup> October 2011, 21<sup>st</sup> May 2012 and 26<sup>th</sup> August 2014. Mr. Mutua was however of the view that res-judicata cannot be invoked herein because new issues are being raised.

Res-judicata is provided for under **Section 7 of the Civil Procedure Act** 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”***

Mr. Mutua for the applicant has argued that new issues have been raised by the application now before me. The new issue is that the charge is defective since there was no consent of the Land Control Board and also the charge was not attested to by an advocate. The record however shows that an advocate by the name of Stephen K. Kibunja confirmed that the plaintiff/applicant did sign the charge in his presence. In any event, the issues about the legality of the charge are matters which were well within the knowledge of the plaintiff/applicant when she filed her first application for injunction way back on 17<sup>th</sup> October 2011 and that cannot be a new matter. Res-judicata is not confined to the issues which the Court is actually asked to decide but covers issues or facts which are so clearly part of the subject matter of litigation and so clearly could have been raised and it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of the same issues – **GREENHALGH VS MALLARD 1974 2 ALL E.R 255 et 257**. It cannot therefore be true that when the plaintiff/applicant filed her first pleading on 17<sup>th</sup> October 2011, she did not know about the charge being illegal or that the same had not been attested. Similarly, in **POP-IN (KENYA) LTD VS HABIB BANK C.A CIVIL APPEAL NO. 80 of 1988 (NBI)**, the Court of Appeal stated that parties must bring before the Court exercising due diligence, all the points that they could take and that points not taken then cannot be taken again as the same would amount to an abuse of the process of the Court.

Further, in **UHURU HIGHWAY DEVELOPMENT LTD VS**

**CENTRAL BANK OF KENYA & TWO OTHERS C.A CIVIL APPEAL NO. 36 of 1996 (NBI)**, the Court addressed itself on this issue as follows:-

***“The long and short of all this is that once an application for injunction within a suit has been heard and determined under the principles laid down in GIELLA VS CASSMAN BROWN, a similar application cannot be brought unless there are new facts, not brought before the 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”***

As I have indicated above, all the matters being raised in the application dated 17<sup>th</sup> September 2015 are matters which, with due diligence, the plaintiff/applicant ought to have pleaded in her first application dated 17<sup>th</sup> October 2011 but which she did not raise. They are not new facts and this application is clearly res-judicata and an abuse of the process of the Court. That should be enough to dispose off the application dated 17<sup>th</sup> September 2015.

I will however proceed to consider the merits of the same application should I be wrong on the issue of res-judicata.

When the first application for injunction was placed before Ong’udi J, she delivered a ruling on 31<sup>st</sup> January 2012 allowing a temporary order to last ***“for only 60 days from the date of ruling”*** so as to enable the applicant ***“reorganize herself and get a buyer or pay the loan”***. Before making that order the judge was satisfied that the plaintiff/applicant’s indebtedness to the defendant/respondent was not in issue and also that the statutory notice was issued as required in law. There is nothing to suggest that an appeal was raised against the finding.

It is clear from the record that the applicant later had the 60 days period extended to 180 days by Mabeya J. on 25<sup>th</sup> May 2012. She then moved Ong'udi J. again by a similar application dated 12<sup>th</sup> August 2013 who dismissed it with costs. In dismissing the said application, Ong'udi J. made the following observations:-

1. ***The plaintiff/applicant does not dispute that she owes money to the defendant/respondent.***
2. ***The plaintiff/applicant has not paid the Auctioneers charges.***
3. ***The plaintiff/applicant has not complied with the Court order directing her to get a buyer within sixty (60) days.***
4. ***Even after she had been given an addition of 180 days, the plaintiff/applicant had extended for herself 14 months from 21<sup>st</sup> May 2012.***

In dismissing that application, Ong'udi J. made the following observations:-

***“The applicant is now before this Court to have injunctive orders herein extended. The said orders lapsed on 6<sup>th</sup> February 2013 and were never extended. There is therefore no order for the Court to extend. The applicant has all along known she charged her property to the bank for a loan which she has not repaid. If she has found a buyer as she claims, she should present that buyer to the bank for their necessary action. It is an abuse of the Court process for a party not to comply with orders of the Court and yet run to the same Court at her convenience”***

An application for injunction will be considered in line with the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:-

1. ***That the applicant must show a prima facie case with a probability of success.***
2. ***That the applicant must demonstrate that if the injunction is not granted, he will suffer irreparable injury that cannot be compensated by an award of damages, and***
3. ***If in doubt, the Court will determine the application on the balance of convenience.***

It must also be remembered that being an equitable remedy, an injunction will be denied where a party has not approached the Court with clean hands.

The applicant herein seeks to stop the defendant/respondent from exercising its statutory powers of sale. A finding has already been made by Ong'udi J. that the plaintiff/applicant's indebtedness is not in dispute and further, that the statutory notice was issued as required. In the application dated 17<sup>th</sup> September 2015, the applicant raises issues that the charge is invalid and in any case, there was no attestation. An advocate who attested to the charge has confirmed that the applicant signed it in his presence. In any case, these are issues which ought to have been raised in the first application and are therefore res-judicata as I have found above. It is clear from the above that the plaintiff/applicant has not established a prima facie case to warrant the orders sought. In **MRAO LTD VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS 2003 K.L.R 125**, the Court, citing **HALSBURY'S LAWS OF ENGLAND** stated that the mortgagee will be restrained only if the mortgagor pays the amount claimed in Court, that is the amount which the mortgagee claims is due to him unless on the terms of the mortgage, the claim is excessive. The plaintiff/applicant herein has been given sufficient time by the Court to find a buyer for the property. She has not done so. She has also not complied with orders issued by the Court and is therefore not deserving of the equitable remedy of injunction. Indeed the Court has bent backwards in order to accommodate the applicant and she must be informed, which I hereby do, that it is an abuse of the Court process to file numerous applications seeking reliefs which have been considered previously. The plaintiff/applicant has not satisfied me that she has a prima facie case with a probability of success and on that basis alone, the application dated 17<sup>th</sup> September 2015 must be dismissed and I need not consider the other limbs in the **GIELLA** case (supra). Even if this Court was minded to make an order that the debt owing to the defendant/respondent be paid in Court, it is clear from the circumstances of this case that, given the history of the plaintiff/applicant, that order will be in vain. Courts shall not act in vain.

Ultimately therefore, upon considering all the matters raised herein, I find that the plaintiff/applicant's Notice of Motion dated 17<sup>th</sup> September 2015 is devoid of merit. The same is accordingly dismissed with costs to the defendant/respondent.

**B.N. OLAO**

**JUDGE**

**13<sup>TH</sup> NOVEMBER, 2015**

13/11/2015

Before

B.N. Olao – Judge

Gichia – CC

Plaintiff/Applicant – present in person

Mr. Kimani for Defendant/Respondent – present

COURT: Ruling dated, delivered and signed in open Court this 13<sup>th</sup> November, 2015.

**B.N. OLAO**

**JUDGE**

**13<sup>TH</sup> NOVEMBER, 2015**