



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ELC NO.312 OF 2013

NELSON ODONGO

KEPHER ODONGO.....PLAINTIFFS

VERSUS

NATIONAL BANK OF KENYA LIMITED

LEGACY AUCTIONEERING SERVICES.....DEFENDANTS

R U L I N G

1. The two plaintiffs herein – **NELSON ODONGO** and **KEPHER ODONGO** – came to Court on 12/11/2013 after being served with a Notification of sale from 2nd defendant – **LEGACY AUCTIONEERING SERVICES** – for intended sale of Land Parcel L.R. No. **WEST BUNYORE/EKWANDA/1146**. The second defendant was acting on instructions from 1st defendant – **NATIONAL BANK OF KENYA LIMITED**.
2. It appears clear that the plaintiff's late father – **JOHN ODONGO ABADHA** – had charged that property and another – **L.R NO. WEST BUNYORE/EKWANDA/1139** – for some loan but died before making full repayment.
3. The plaintiff's story is that the 1st defendant wrote off the loan after negotiations but the 1st defendant insists that there was no such thing.
4. Together with the suit was also filed an application for restraining orders. That application is the subject of this ruling.
5. The application is a Notice on Motion and is brought under Order 40 Rules 1(a) and 4 of Civil Procedure Rules and Sections 1A, 1B, 3A of Civil Procedure Act and all other provisions of law. Prayers 1 and 2 are moot, having been dealt with earlier exparte.
6. At this stage therefore, what is for consideration are prayers 3 and 4, which are as follows:

Prayer 3: That an injunction do issue against the defendants restraining them either by themselves or their agents and/or servants from selling, disposing off by public auction or otherwise parcel L.R. NO. WEST BUNYORE/EKWANDA/1146 or in any other way whatsoever interfering with the plaintiff's peaceful occupation of the property pending the hearing and final determination of this suit or further orders of the court.

Prayer 4: That costs of this application be provided for.

7. The application is premised on grounds, inter alia, that the defendants have advertised the property for sale; that the 1st defendant is estopped from demanding loan monies having written off the debt and released the titles to the plaintiffs; that no charges were ever registered and the defendants in law therefore lack power to sell the property; and that the plaintiffs will suffer

- irreparable harm should the sale proceed.
8. The supporting affidavit accompanying the application reiterates the grounds and gives some history. It appears clear that the first plaintiff lives on the land.
 9. The 1st defendant replied vide grounds of opposition dated 25/11/2013 and a replying affidavit dated 23/11/2013. It was stated, inter alia, that the plaintiffs lacked **LOCUS STANDI** to bring the suit, having failed to take out letters of administration. The suit was also said to be **RES JUDICATA** as there was another suit – **HCC NO.41/95**, which was finalized. It was stated also that the verifying affidavit accompanying the plaint fails to disclose the existence of **HCC NO.41/95**.
 10. The replying affidavit talked of a loan advanced to the late father of the plaintiffs who in turn gave the two parcels of land mentioned herein as security. There was default in repayment and the first defendant decided to exercise its statutory power of sale.
 11. The plaintiff's late father instituted a suit – **HCC NO.41/95** – and obtained orders temporarily stopping the sale. There was then an attempt to engage the family of the plaintiff's late father to salvage the charged properties but there was no agreement and the 1st defendant decided to proceed with the sale. It re-issued Statutory Notices on 12/3/2006 and 11/6/2014.
 12. The deponent in the replying affidavit said that the letters – marked No.3(4) and No.3(5) – whose authorship is attributed to her are forgeries and the signatures on them are not hers. She talked of contemplating criminal complaints against the plaintiff for investigations to be carried out.
 13. According to the deponent also, the 1st defendant still holds to the properties. She availed a search copy to show that the properties are still charged.
 14. Both sides availed written submissions in lieu of hearing. The plaintiff's submitted that they have met the conditions necessary to grant injunctive relief. Noting that the defendant alleged lack of Locus Standi on the part of the plaintiffs, the plaintiffs pointed out that they have a grant ad Litem issued to them in High Court Succession Cause No.1179 of 2013. The grant was issued to them on 12/11/2013.
 15. The plaintiffs instead blame the defendants for issuing statutory notices to supposed personal representatives of the late John Odongo Abadha while in actual fact, and in law too, there were no such representatives at the time the notices were issued.
 16. It was pointed out too that the loan had been written off. The plaintiffs referred to correspondence leading to and surrounding such write-off. They disputed the defendant's allegations that some of the correspondence was forged. They also pointed out that after the write off, the certificates of title were released to them.
 17. The plaintiffs also noted that the alleged loan was disbursed in 1992. The deceased died in 1999. The 1st defendant is said not to have offered explanation as to why there is a delay of over 14 years before exercising the power of sale to recover the debt. According to the plaintiffs, it is possible that the defendant's action is caught up by provisions of Limitation of Actions Act. (Cap 22).
 18. The plaintiffs also addressed the issue of **RES JUDICATA** made by the plaintiff. They pleaded lack of knowledge of the existence of **HCC NO.41 OF 1995**. They faulted the 1st defendant for only availing a copy of the plaint. They submitted that no proceedings, judgment and decree were exhibited. It cannot therefore, they said, be conclusively asserted that the suit was heard and determined. They said too that the present suit is based on a different event viz: the threatened sale of the property on 15/11/2013. The parties are also said to be different. **RES JUDICATA** therefore is said not to lie.
 19. The submissions of the 1st defendant are two pronged. The first issue raised is that of Locus Standi. According to the 1st defendant the plaintiffs are without locus because they lack letters of administration. And the legal position as espoused in **MAATHAI VS KENYA TIMES MEDIA TRUST (1959) KLR** and **DORIS AUMA & Another VS HITAN C MAJEDUDIA (2014) Eklr**, is that a suit instituted without such letters is **VOID AB INITIO** where it concerns the estate of a deceased person. The court was also referred to the case of **NATHANIEL O. KHISA VS MARY KHISA NYANYI & 3 others (2013) eKLR** where the suit was struck out precisely for such reason.
 20. The 2nd issue raised is **RES JUDICATA**. This issue is raised because there was an earlier suit – **HCC NO.41 OF 1995** between the chargor (deceased father of the plaintiffs) and the chargee (1st defendant). The suit is said to have settled matters raised in the present application. The plaintiffs

- were also faulted for not disclosing the existence of the earlier suit. For **RES JUDICATA**, the case of **JAPHETH OGENDO OWUOR VS AKUOM O. LEONARD & CO. AUCTIONEERS & 4 others (2006)** Eklr was cited for guidance.
21. I have considered the application, the responses made, the annexures availed, the rival submissions, and the entire suit as filed. The defendants premise their opposition on the two issues raised in their submissions. The first issue is **LOCUS STANDI**. The allegation made is that the plaintiff didn't have a grant. Well, they had. And the grant is dated 12/11/2013, the same day the suit was filed.
 22. If the plaintiffs didn't have a grant the law would apply exactly the way the defendants argued. I must point out that the defendant articulated the law well but all the arguments must fail because everything was based on a false premise namely: That there was no grant.
 23. The other issue is **RES JUDICATA**. Again the defendant is wrong on this. In an attempted move to prove it, a plaint was availed. Also availed was a temporary restraining order issued in the earlier suit. But the plaintiffs responded rather well to this issue. First, the 2nd defendant in this case was not a party in the earlier suit and, second, the earlier suit was never heard and determined.
 24. I agree with the plaintiffs in their observations. **RES JUDICATA** does not apply where a party sued in the latter suit was not a party in the earlier suit. It does not also apply where the earlier suit was never heard and determined. That is precisely the situation obtaining here. The 1st defendant needed to read Section 7 of Civil Procedure Act (Cap 21) carefully in order to note that the suit must be one that is heard and determined and that the parties are the same or, if different, are directly related or litigating under the same title.
 25. I expected that in addition to the plaint, the 1st defendant would avail a judgment and/or a decree. I also find merit in the plaintiff's assertion that the present suit is a response to a later event: an event that arose after the earlier suit was filed. The event may be similar in nature and character to the event that led to the earlier suit but it is certainly not the same and is distinctively separate. The earlier suit couldn't respond to it and the plaintiffs certainly had a right to respond to it the way they did. I need to point out that if this issue was premised on the correct factual situation, again the law would apply the way the 1st defendant articulate it. But the 1st defendant was clearly wrong in its appreciation of circumstances and in its understanding of the operation of **RES JUDICATA**.
 26. It can be seen that the two issues comprising opposition to the application have failed. Other issues were raised also. The plaintiffs said there are no charges existing and the debts were written off. They said the titles were released to them. The first defendant said the charges exist and that the titles are held by it. The plaintiffs availed copies of titles and copies of search showing the charges are not in existence. The 1st defendant didn't avail titles, copies should have been availed. The 1st defendant availed a copy of search showing that the charges exist. Its copy of search is dated 3/7/2013. But the plaintiffs also availed searches dated 18/9/2013 showing that there were no charges. The plaintiffs searches are the later searches perhaps showing the latest position. If the 1st defendant wanted to convince more, it should have gone for a copy of the register or green card. That would have provided more detailed and more reliable information. As things stand, there is apparent conflict and contradiction in the searches and I can't hold that the 1st defendant drove the point home.
 27. The 1st defendant's representative, D.W. Gitonga, disputed her signatures as appearing in annexures No.3(4) and No.3(5) availed in the supporting affidavit by the plaintiffs. These annexures are letters dated 11/6/2013 and 27/7/2007. According to 1st defendant, the two are forgeries. In fact, Gitonga threatened to commence complaints of a criminal nature.
 28. But I am constrained to observe that Gitonga didn't show her correct signature. That being the case, I have to assume that the signature appearing on the replying affidavit is her correct signature. She is the deponent in that affidavit and has signed it. True, the signature is different from the signatures appearing in the annexures she termed as forgeries. But there is another signature appearing in another letter. That letter is an annexure marked No.1 in the plaintiff's affidavit that responded to the replying affidavit. The letter is dated 23/8/2013. It is attributed to Gitonga. She has not denied that signature. That signature is different from Gitonga's signature appearing in the replying affidavit. The question is: How does Gitonga's genuine signature look

like? I must leave the matter at that now; but I must observe that Gitonga's assertions on this issue are not convincing at this stage.

29. My highlight and analysis up to this point show well that the application herein is well founded. A prima facie case is well made out and the possibility of irreparable loss is demonstrated given that the 1st plaintiff says he is living on the land and has developed it. I note too that the 1st defendant has not undertaken to pay damages. It is in light of all this that I allow the application and grant prayer 3. Costs however will be in the cause.

A.K. KANIARU – JUDGE

19/3/2015

19/3/2015

Before A.K. Kaniaru – Judge

George Diang'a – Court Clerk

No party present

Indumuli for Yogo for respondent

Omolo for Applicant absent

Interpretation: English/Kiswahili

COURT: There is a Notice for delivery of the ruling herein. The notice is dated 10/3/2015. Accordingly, ruling on application filed on 12/11/2013 read and delivered in open **COURT**.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

19/3/2015

AKK/vaa