



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRAL DIVISION**  
**CIVIL CASE NO. 479 OF 2010**

**KIVANGA ESTATES LIMITED ..... PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA ..... DEFENDANT**

**RULING**

1. The Application before this Court is dated 21st January 2014 brought by the Defendant/applicant seeking to have the suit struck out under the provisions of **Order 2 rule 15 (1) (b) and (d)** as well as **Order 51 rule 1** of the *Civil Procedure Rules, 2010*. The Defendant also invoked the provisions of **sections 1A, 1B and 3A** of the *Civil Procedure Act*. The Application was brought on the following grounds:
  - a) **THAT the Plaintiff’s suit is a gross abuse of the Honourable Court’s process.**
  - b) **THAT the Plaintiff’s suit is otherwise frivolous and is intended to vex and unnecessarily embarrass the Defendant.**
  - c) **THAT the Plaintiff has filed multiple suits over the years with only one aim, which is to frustrate and/or prevent the Defendant in its capacity as a Chargee from exercising its statutory powers of sale.**
  - d) **THAT the Plaintiff is presently in default of the loan repayments, and no effort has been made or at all for years to mitigate the losses presently being incurred by the Defendant since 1987 when a Charge in respect of Plot No. 112/19 Embu Township (“the suit property”) was registered.**
  - e) **THAT the present suit is yet another attempt by the Plaintiff to bar the Defendant from realizing its rightful and lawful securities and is brought in bad faith and against the principle that litigation must come to an end”.**
2. The Defendant’s said Application was supported by the affidavit of **Damaris Wanjiku Gitonga** sworn on even date. The deponent detailed that she was the Manager in charge of legal services for the Defendant bank. She noted that the Defendant was the successor in business of the Kenya

National Capital Corporation Ltd which company had provided financial facilities to the Plaintiff supported by a Debenture dated 19th February 1987. It was also registered as Chargee in respect of the Plaintiff's property being Plot No. 1112/19 Embu Township ("the suit property"). She noted further that the Plaintiff had filed a suit in Meru being **HCCC No. 320 of 1990 (O. S.)** in which it had contested the intended sale by the Defendant of the suit property. That suit had been dismissed by **Oguk J.** on 19th June 1991. The Plaintiff had not appealed nor applied to set-aside the Order for dismissal. The deponent went on to say that later in 1996, the Plaintiff had filed a further suit being **HCCC No. 3011 of 1996**. That suit was dismissed for want of prosecution on 17th July 2003. Again the Defendant took steps to commence the sale of the suit property under its statutory power of sale but the Plaintiff filed yet another suit being **HCCC No. 111 of 2003 (Meru)** which was transferred for determination before the High Court at Milimani and allocated a new number being **HCCC No. 2 of 2004**. That suit, according to the deponent, was dismissed by **Njagi J.** on 25th February 2010. Mrs. Gitonga went on to say that the Plaintiff had filed the instant (and fourth) suit in yet another attempt to bar the Defendant from realising its securities. She had been advised by the Defendant's advocates on record that both this suit and the others were a gross abuse of the Court Process as the Plaintiff had never been keen to prosecute any of its suits. It was also frivolous and was intended to vex and unnecessary embarrass and frustrate the Defendant. The deponent went on to say that the Plaintiff had been and continues to be, in default of the loan repayments and has made no effort at all to mitigate the Defendant's losses since 1987.

3. A director of the Plaintiff company one **Morris Guchura Njage** swore a Replying Affidavit on 3rd April 2014. He stated that it was true that the Plaintiff had maintained three previous suits as against the Defendant but none of them were heard and finally determined in respect of the matters outstanding between the parties. He went on further to say that all the previous suit filed except for **HCCC No. 111 of 2003** were not founded on the same cause of action as the current suit. He then detailed the issues between the parties in each of the other suits and pointed out that in the present suit, the Plaintiff sought a declaration that the mortgage as between the parties was time barred and irrecoverable. These were not the issues raised in the Originating Summons in **HCCC No. 111 of 2003**. He concluded that it was clear that none of the suits had been heard conclusively by any of the Judges to justify the current matter being *res judicata*. The deponent adopted the Grounds of Objection which the Plaintiff had filed herein also on 3rd April 2014. These read as follows:

**"1. The Plaintiff's suit is neither frivolous nor intended to vex and unnecessary embarrass the defendant in that none of the Plaintiff's previous suits have been heard and finally determined on merit.**

**2. The Plaintiff's previous suits have all be dismissed on technical grounds and not by way of hearing.**

**3. No judgment in any of the previous suit has ever issued as a final determination in any of the suits.**

**4. The doctrine of Res-Judicata is not available to the defendant in this suit.**

**5. The defendant by its conduct has placed the plaintiff in a situation by which it would be unreasonable to the plaintiff if the defendant's rights of auctioning the suit premises (if any) is allowed".**

4. The Defendant's submissions were filed herein on 9th May 2014. Having set out in the basis of the Application, the Defendant listed in the suits that had been filed as between the parties hereto. It maintained that the Plaintiff had filed the instant suit in another attempt to bar the Defendant from realising its rightful and lawful security. The suit had been brought in bad faith and against the principle that litigation must come to an end. It itemised the objectives of the four suits as follows:

**"a) The Plaintiff's present suit is otherwise frivolous and is intended to vex and**

unnecessarily embarrass and frustrate the Defendant.

b) The Plaintiff's present and past suits (the first one filed in 1990) are a gross abuse of the Honourable Court's process. The Plaintiff has never been keen to prosecute any of its cases.

c) The Plaintiff has filed multiple suits over the years with only one aim, which is to frustrate and/or prevent the Defendant in its capacity as a Chargee from exercising its statutory powers of sale.

d) The Plaintiff has been and continues to be in default of the loan repayments, and no effort has been made or at all for years to mitigate the losses presently being suffered by the Defendant since 1987 when a Charge in respect of Plot No. 1112/19 Embu Township ("the suit property") was registered. In the circumstances, the present and past suits are not serving justice nor protecting the interests of the Defendant as a chargee.

Your Lordship, the Plaintiff enjoys the status of protection by the multiple suits in Court which is a clear example of abuse of the Honourable Court's process.

e) The continued pendency of this suit is so prejudicial to the Defendant as no offer at all has been made by the Plaintiff to make any form of settlement.

f) The Plaintiff has never paid the costs of the first, second and third suits all in which the Defendant was the successful party. No offers have been made with respect to this issue over years".

The Defendant pointed out that the parties to the suits had been the same all the time, the titles had always been the same and there has always been concurrent jurisdiction. The Defendant relied upon the cases of Fleur Investment Ltd v the Permanent Secretary, Ministry of Roads & 4 Ors (2012) eKLR as well as the Chairman District Alcoholic Drinks Regulation Committee & 4 Ors & 2 Ors ex-parte Detlef Heier & Anor (2013) eKLR.

5. The Plaintiff's submissions were filed alongside the Replying Affidavit on 3rd April 2014. It commenced by setting out the provisions of **section 7** of the *Civil Procedure Act – res judicata*. Thereafter it submitted that in order for a plea of *res judicata* to succeed the following conditions had to be fulfilled:

**“a. The matter in issue is identical in both suits.**

**b. The parties in the suit of the same.**

**c. Sameness of title.**

**d. Concurrence of Jurisdiction.**

**e. Finality of the previous decision.”**

The Plaintiff went on to refer this Court to a number of authorities including **Civil Appeal No. 110 of 2011 Nicholas Njeru v the Attorney General & 8 Ors, HCCC No. 60 of 2012 Geoffrey M. Kabethi v Peter W. Njogu & Anor., ELC No. 411 of 2013 Loise M. Gachinga & Anor. v Stephen Kiiru Mugo & Anor., ELC No. 62 of 2013 Michael C. Toroitich v Peter M. Y. Chebii, HCCC No. 58 of 2012 Enock K. Muhanji v Hamid Abdalla Mbarak and ELC No. 66 of 2012 Mwaniki Kibui v Jane M. Waweru & 6 Ors.**

The Plaintiff went on to say that the matters in issue were not identical in all the suits and detailed the

various prayers as had been sought in **HCCC No. 320 of 1990**, **HCCC No. 3011 of 1996** and **HCCC No. 111 of 2003 (Meru)**. It also submitted that there was no finality as regards the previous decisions in relation to the 3 suits. In this regard, finality of a decision had been held to be that the issues in dispute must be presented, ventilated, considered by all the parties and the Court must have come to a determination of the same. The Plaintiff maintained that none of the previous suits had satisfy these principles in that:

- a. HCCC No. 320 of 1990 was disposed of at a preliminary stage of the application for injunction.
- b. HCCC No. 3011 of 1996 was dismissed for want of prosecution having not been considered or determined.
- c. HCCC No. 111 of 2003 (later renumbered HCCC No. 2 of 2004) was also dismissed at a preliminary stage for want of particulars.

The Plaintiff maintained that all these matters had been disclosed in the Plaintiff herein. It agreed what the Defendant had stated that the Plaintiff had never paid the costs in any of the three previous suits. This was correct since no taxation proceedings had been commenced by the Defendant or any demand whatsoever made of the Plaintiff.

6. The Court has considered the Application, the Affidavits for and against the same as well as the Plaintiff's Grounds of Objection. The Application is brought under the provisions as detailed above of **Order 2 rule 15 (1) (b) and (d)** of the *Civil Procedure Rules, 2010*. Such reads as follows:

**“15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that –**

**(b) it is scandalous, frivolous or vexatious; or**

**(d) it is otherwise an abuse of the process of the court,**

**and may order the suit to be stayed or dismissed or judgement to be entered accordingly, as the case may be.”**

The Plaintiff would seem to have interpreted the Defendant's Application to be based on the plea in bar of *res judicata* and has gone to great lengths to show that each of the three previous suits had different prayers by way of remedy and involved separate sets of facts. It also submitted that there had been no finality in the determination of the three suits by the Judges who dealt with the same. On my part, I have had cause to examine the Exhibits to the Affidavit in support of the Application. **HCCC No. 320 of 1990 (Meru)** was brought by way of Originating Summons and the first question raised was whether it was just and equitable for the Respondents (the Defendant herein) to proceed with the sale of the suit property. It appears that from the Ruling annexed to the Replying Affidavit in relation to that suit that **Oguk J.** gave consideration to the Originating Summons, vacated the *ex-parte* Orders that had been previously given and allowed the Defendant herein its right to exercise its statutory power of sale.

7. Coming to **HCCC No. 3011 of 1996**, it is clear from the Affidavit in support of the Application that the Plaintiff herein was seeking, in the first prayer of its Chamber Summons dated 4th December 1996, a temporary injunction to restrain the Defendant and/or its agents the auctioneers from selling the suit property. It also appears that at the *ex-parte* stage a temporary injunction was granted by **Ole Keuiwa J.**(as he then was). However, from the Affidavit in support of the Application it appears that the case was dismissed for want of prosecution on 17th July 2003. It also appears that the Defendant then proceeded to attempt to exercise its statutory power of sale once more. This led to the filing of **HCCC No. 111 of 2003** which sought in prayer d) thereof, a perpetual injunction directed to the first Defendant therein (the Defendant herein) its servants and/or agents restraining them from interfering in any way with the Plaintiff's title to possession and/occupation of the suit property. I agree that there were other prayers including an

unconditional discharge of the Charge over the suit property and the discharge of the Plaintiff's obligation to repay the advances that had been made to it. After that suit was transferred to Nairobi for consideration and determination, the Plaintiff failed to comply with an Order of discovery leading to **Njagi J.** dismissing the suit with costs on 25th February 2010.

8. Then we have the suit before this Court. The Plaint herein was dated 13th July 2010 and prayer (c) sought Orders permanently restraining the Defendant from auctioning or selling the suit property. There were other prayers including that the Defendant's claims as against the Plaintiff are time-barred and for Orders that the Charge over the suit property be discharged in the same way as had been prayed for in **HCCC No 111 of 2003** as above. **Section 7** of the *Civil Procedure Act* as regards the plea in bar of *res judicata* reads as follows:

**"7. 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.**

**Explanation (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.**

**Explanation (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.**

**Explanation (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.**

**Explanation (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.**

**Explanation (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.**

**Explanation (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating".**

9. **Section 7** of the *Civil Proceeded Act* was referred to and considered in the first of the Plaintiff's authorities being the Court of Appeal case of **Nicholas Njeru** as above. Quoting from **Reference No. 1 of 2007, James Katabazi & 21 Ors v the Attorney General (of Uganda)** the Court stated for the doctrine to apply:

- **the matter must be 'directly and substantially' in issue in the two suits,**
- **the parties must be the same or parties under whom any of them claim, litigating under the same title; and**
- **the matter must have been finally decided in the previous suit (See Uhuru Highway Development Ltd v Central Bank & 2 others – Civil Appeal No.36 of 1996)."**

In my view, the other authorities quoted by the Plaintiff herein were all along the same principles as expounded in the Court of Appeal authority, as above, by which I am bound. From the Defendant's

authorities I found some assistance from the Judgement of my learned brother **Majanja J.** in the **Fleur Investment** case (supra) at paragraph 35 of his Judgement:

**“35. In my view, this petition is another suit filed to litigate the same matter between the same parties seeking similar relief. It is an abuse of the court process to file a multiplicity of suits seeking similar relief in respect of the same subject matter.”**

Further, **Angote J.** came to a similar conclusion in the **Chairman District Alcoholic Drinks Regulation Committee** case (also supra) when he detailed at paragraphs 38 and 39 thereof:

**“38. A party who wishes to file a suit which is similar to an existing suit must withdraw the first suit first. This court cannot allow parties to be filing a multiplicity of suits on the basis that they have found that the previous suit(s) wanting either in content or form. The court must and should invoke its inherent jurisdiction to stop such abuse of the court process.**

**39. Abuse of court process includes a situation where a party improperly uses judicial process to the irritation, harassment and annoyance of his opponent and to interfere with the administration of justice.”**

In my view, the above is exactly what the Plaintiff has done in this suit before Court. I find that not only has the Defendant succeeded in so far as the plea in bar of *res judicata* is concerned but and more particularly, I fully concur with its submission that this suit is a gross abuse of the Court's process, it is frivolous, it is intended to vex and unnecessarily embarrass the Defendant. I have no hesitation in striking out the suit on the basis of **Order 2 rule 15 (1) (b) and (d)** as above. The Defendant will have the costs of this suit accordingly. Further, the advocates for the Plaintiff should note that in following the principle of finality in litigation, they run the risk of being condemned in costs themselves by continuing to advise their client, the Plaintiff, to pursue what amounts to an abuse of the Court's process.

**DATED and delivered at Nairobi this 31<sup>st</sup> day of July, 2014.**

**J. B. HAVELOCK**

**JUDGE**