



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 734 of 2010**

**EDWARD GATIBA MBUGUA ..... PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF (K) LIMITED ..... DEFENDANT**

**R U L I N G**

1. The Plaintiff filed a Notice of Motion on 5 December 2012 which asked for three main prayers: firstly, that pending the hearing of the Application *inter-partes*, the transfer of the four properties named in the Plaint to any person having purchased the same at an alleged auction held on 13 October 2010 be stopped by an injunction of this court. Secondly, the Plaintiff requested that leave be granted to amend the Plaint and thirdly, an injunction restraining the Defendant against transferring the said properties be granted pending the hearing and final determination of this suit. The grounds upon which the Application are brought were that the Plaint failed to disclose material facts necessary for justice to be done and that its intended amendment would not prejudice the Defendant in this suit. Thirdly, no proper notices to realise the securities were given as required by the *Registered Land Act* and the Plaint as drawn does not adequately explain this. The Application was supported by the Affidavit of the Plaintiff sworn on the 4 December 2012. However, that Affidavit referred to the Application for amendment of the Plaint but there was a second Supporting Affidavit that did touch upon the 2 injunction requests but only to the extent that the deponent stated that he had never received any notice from the Defendant as to the sale of his said properties

2. One **Castro Mutai**, the Recoveries Officer of the Defendant bank swore a Replying Affidavit on 14 January 2013. His first reaction to the Plaintiff's Application was that the same was an afterthought, incompetent, and unmeritorious and an abuse of the court process aimed at delaying the Defendant's exercise of its statutory rights. He noted that the Plaintiff had admitted filing a previous suit against the Defendant bank in which the Plaintiff had sought similar orders involving the same subject matter as this suit, being *CMCC No. 5774 of 2010*. The injunction was not granted therein and he attached a copy of the Order of dismissal. He then noted that the Plaintiff had instituted this suit being between similar parties over the same subject matter. In this suit, the Plaintiff had filed an application which sought the following orders:

**“a) The Respondent herein do supply statements and accounts of liabilities to the applicant as from the date of the advanced loan.**

**b) The District Land Registrar Thika be prohibited from registering any transfer that pertains to land parcels Chania/Kairi/876, Chania/Kairi/1032 (Original No. 59), Chania/ Kanyoni/753 and Chania/Ngorongo/T.379 pending the hearing and determination of this application.**

c) **An injunction do issue restraining the Respondents by themselves, agents, servants, buyers or anybody interested in the charged land parcels from encroaching, entering, alienating, trespassing or from any way dealing with Land Parcels Nos. Chania/Kairi/876, Chania/Kairi/1032 (Original No. 59), Chania/Kanyoni/753 and Chania/ Ngorongo/T.379 pending the hearing and determination of this application.**

d) **Costs of this application be provided for”.**

Mr. Mutai also noted the Ruling of Mr. Justice Njagi in connection with that application which was delivered on 21 November 2012. The Judge had commented that the Defendant had a right to take steps in order to realise its security and that the service of the Statutory Notice effected by registered mail on the Plaintiff was satisfactory. The Judge had also noted that the Plaintiff was present when the said auction sale had been conducted and that the matter was *res judicata* as the Defendant had not been served with a Withdrawal Notice in connection with the subordinate court suit. The Judge had also found that the Plaintiff had not made out a *prima facie* case.

3. Mr. Mutai continued with his Replying Affidavit by stating that an injunction cannot issue where there is a debt due and a Statutory Notice has been served. He had also been advised by the advocates on record for the Defendant that the Application herein had been overtaken by events as the transfer of the suit property was in the process of being completed and thus an injunctive order to prevent such transfer was inappropriate. Turning to the Application to amend the Plaintiff, the deponent was of the view that the proposed Amended Plaintiff did not raise any new and distinct issues. The matters referred to in the proposed Amended Plaintiff had already been litigated upon and determined and, as such, the same was *res judicata*.

4. When the 2 counsel appeared before court on 16 January 2013, Mr. Khamati, learned counsel for the Plaintiff, noted that the Application to amend the Plaintiff was seeking to introduce a new party Mr. Harrison Mbugua Nyaga as second Plaintiff as well as Mr. Gikonyo trading as Garam Investments, the auctioneer who was involved in the said auction sale, as the second Defendant. He admitted that the first Plaintiff was the borrower and secured the loan obtained from the Defendant by charging his father's (the intended second Plaintiff) 2 plots Chania/Kairi/876 and Chania/Kairi/753. The Plaintiff was the registered owner of the other two plots which were charged to the Defendant bank being Chania/Kairi/1032 and Chania/Kairi/T. 379. Counsel submitted that the proposed second Plaintiff's interests had been prejudiced and there was no indication that he was ever served with the Statutory Notice and the Proclamation. The proposed second Plaintiff could not be held responsible for the actions of the Plaintiff who is his son. There was nothing in the pleadings either in the previous suit or this suit which showed that the proposed second Plaintiff even existed and that he was the owner of two of the properties the subject of the so-called auction. Mr. Khamati continued by saying that there was nothing in the pleadings on record to indicate in what manner the proposed second Plaintiff had been served with the Statutory Notices. As far as the Plaintiff was concerned the saving grace was that the Transfers in respect of the four properties had not been registered in favour of the so-called purchasers as yet, although the Plaintiff had his application for injunction refused 2 or 3 times. At this stage, counsel sought the prayer for the Amendment of the Plaintiff in order for the proposed second Plaintiff to come on record. He also sought the injunction on the part of the proposed second Plaintiff but emphasised that such was in respect of all the four properties.

5. Miss Muragari appearing for the Defendant submitted that there was no *prima facie* case made out by the Plaintiff for an injunction to issue and, in any event, the matter was *res judicata*. This had been admitted by the Plaintiff in paragraph 4 of his Affidavit dated 8 April 2011 where he had detailed the institution of *CMCC No. 5774 of 2010*. In that suit, he had sought injunctive orders based on the grounds that the auction sale had been improperly conducted. Counsel then outlined the proceedings in this suit as before Njagi J. His Ruling delivered on 21 November 2012 by Mutava J. had dismissed the Application for injunction and he had found that the Statutory Notices had been validly served. The issues that were being raised before the court had already been heard and determined both in the subordinate court as well as this court. Counsel referred the court to **section 7** of the *Civil Procedure Act* as well as the case of **Kalume M. Deri & Anor. versus Fundi Wanje & Anor. (2008) eKLR**. She maintained that the fact

that the Plaintiff wanted to bring in a new party does not affect the position where matter has been found to be *res judicata*. As regards the application to amend the Plaint, counsel quoted the case of **Margaret W. Maina versus Housing Finance Company of Kenya Ltd (2005) eKLR** in which it was settled law that an amendment should be freely allowed if made before the hearing of the suit and if no injustice would be occasioned to the other side in terms of being compensated therefore in costs. As regards the Statutory Notice being served upon the proposed second Plaintiff, counsel drew the court's attention to the Replying Affidavit dated 14 December 2012 as per exhibit "AO 4" thereof which clearly indicates that the Statutory Notice was so served. In counsel's view the intended second Plaintiff was well aware of the sale, as well as the facts of the case. Counsel further submitted that the issue of service of the Statutory Notices, the irregular auction sale and the non-provision of accounts were all before the court before and such did not raise any new issues. Finally counsel referred the court to the case of **Francis M. Mutua versus Ali Noor Abdi & 3 Ors. (2012) eKLR**, which clearly brought out the fact that the Plaintiff, having lost its right of redemption, should have filed suit for damages if he had been dissatisfied with the conduct of the sale.

6. In a brief reply, Mr Khamati submitted that I was not bound by the decision of my learned brother **Azangalala J** in the **Kalume Deri** case. Counsel was of the view that an amendment to pleadings can be allowed at any time before judgement. He noted that the damages were never an adequate compensation for loss of land. The Statutory Notice had been served upon the intended second Plaintiff by registered post and counsel maintained that the Certificate of Posting was no evidence of receipt. In his view, it was only appropriate that the amendment be allowed to include not only the intended second Plaintiff but also the auctioneer. As far as the injunction is concerned, the Plaintiff had never disclosed who the alleged purchasers were at the said auction, which he maintained was tainted by allegations of fraud.

7. **Section 7** of the *Civil Procedure Act* 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"**.

The above section was amplified in the **Kalume Deri** case (supra) where my learned brother **Azangalala J** found:

**"The doctrine of *res judicata* applies not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a court of competent jurisdiction but it also applies to situations where either the matters which could have been brought in were not brought in or parties who could have been made parties were not joined."**

I fully adopt the finding of **Azangalala J** as above as well as his quoting the passage in **Mwangi Ngunu v Meshack Mbugo Wambugu HCCC No. 2340 of 1991(unreported)** as follows:

**"If a litigant were allowed to go on forever relitigating the same issue with the same opponent in courts of competent jurisdiction, merely because he gives his case some cosmetic facelift on every occasion he comes to a court, then I do not see what use the doctrine *res judicata* plays."**

8. I have also perused the ruling of **Njagi J** delivered by my learned brother **Mutava J** on the 21 of November 2012. The learned Judge made a number of observations as follows:

(a)As regards the matter being *res judicata* the Judge found that there had been a similar suit to this one filed in the lower court as *CMCC No. 5774 of 2010*, which had been withdrawn but there was no evidence before his court that the Notice of Withdrawal had been served upon the Defendant, in which case the Plaintiff's argument had no basis.

(b) On the issue of irreparable loss, the learned Judge pointed to **section 99 (4)** of the *Land Act (2012)*

which states that where a person is prejudiced by unauthorised, improper or irregular exercise of the statutory power of sale, that person shall have a remedy in damages. If it turned out that the sale conducted by the Defendant herein was in any way irregular then the Plaintiff could come before court utilising the protection given to him under the said Act.

(c) Finally the learned Judge found that the Applicant therein had not established a *prima facie* case with a probability of success and dismissed the Application with costs.

In my opinion, the Plaintiff herein is grasping at straws. I endorse the Ruling in the **Kalume Deri** case as above and I dismiss the Plaintiff's Application for injunction with costs to the Defendant. I hold that the Defendant duly served the Statutory Notices upon the proposed second Plaintiff and that he did have full knowledge and notice of the sale. I also find that the matters raised before me in the said Application are *res judicata*.

9. As regards the Application for amendment to the Plaint, the principles upon which amendments to pleadings may be made are as set out and stated in the Court of Appeal decision in **Eastern Bakery versus Castelino (1958) EA 461**. The principles were summarised as hereunder:

- “1. Amendments sought before hearing should be freely allowed if they can be made without injustice to the other side.**
- 2. There is no injustice cause to the other side if it can be compensated with costs.**
- 3. The court will not refuse an amendment simply because it introduces a new case.**
- 4. There is no power to enable one distinct cause of action to be substituted for another nor to change, by means of amendment, the subject of the suit.**
- 5. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation.**
- 6. The principles applicable to amendments of plaints are equally applicable to amendments of written statements of defence.**
- 7. A judge has discretion to allow amendment to the statement of defence to introduce a counterclaim provided that such an amendment does not transgress any of the aforesaid principles”.**

With the above principles in mind, I have perused the draft Amended Plaint annexed to the Supporting Affidavit to the Plaintiff's Application. The first point to note is that it seeks to enjoin two other parties to the suit one as a second plaintiff and the other as a second defendant. I am unable to understand the point of joining Mr. Gikonyo as a second defendant as there is no remedy or prayer detailed therein as sought against him. Further, the prayers in the draft Amended Plaint talk about the Plaintiff in the singular, there is no mention of the proposed second plaintiff at all. In my view to allow the proposed Amended Plaint to be filed will cause injustice to the Defendant. I find no merit in the same. Accordingly I dismiss the Plaintiff's said Notice of Motion dated 5 December 2012 with costs to the Plaintiff.

**DATED and delivered at Nairobi this 11<sup>th</sup> day of February 2013.**

**J. B. HAVELOCK  
JUDGE**