REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 1023 OF 2013

ABDULKADIR SHARIFF ABDIRAHIM ……………………… PLAINTIFF

VERSUS

ECOBANK KENYA LTD. ……………………………………. DEFENDANT

R U L I N G

1. There are basically 2 Application before the Court for determination, the first dated 8th December 2012 was filed by the Plaintiff herein and the second dated 31st December 2012 was filed by the Defendant. The Plaintiff's said Application sought the following orders:

> **"(a) THAT this application be certified urgent and service be dispensed with in the first instance.**
>
> **(b) THAT a temporary injunction to issue, restraining the Defendant, its servants, employees and/or agents, Auctioneers from, in any way, alienating, transferring, or howsoever dealing with, disposing, selling and/or proceeding with the scheduled intended sale by way of Public Auction of the Plaintiff's property known as L.R. No. 209/11067/22 ("the suit property") thereof pending hearing and determination of the application.**
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> **(c) THAT a temporary injunction to issue, restraining the Defendant, its servants, employees and/or agents from, in any way, alienating, charging, transferring, or howsoever dealing with, disposing, selling and/or proceeding with the scheduled intended sale by way Public Auction of the Plaintiff's property known as L.R. No. 209/11067/22 ("the suit property") thereof pending hearing and determination of the suit.**
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> **(d) A declaration that the intended sale of L.R. 209/11067/22 by the defendant is fraudulent and illegal and thus null and void and the same be set aside.**
>
> **(e) A declaration that the exercise by the defendant of its statutory power of sale was fraudulent and unlawful and the plaintiff's right of redemption be reinstated and or is alive.**

(f) An order for the defendant to furnish before the honourable truthful and just accounts.

(g) THAT the costs of this Application be borne by the defendant"

2. The Defendant's Application by way of Notice of Motion dated 31 December 2012 sought the following orders:

"1. THAT this Honourable Court be pleased to strike out the Notice of Motion dated 18th December 2012 and dismiss the suit as against the Defendant with costs.

2. **THAT the costs of this Application and the suit be borne by the**

Plaintiff.

3. **THAT this Honourable Court be pleased to make such other or further orders as it may deem just and fit in the circumstances of the case."**

After some debate as between counsel for the parties, it was agreed that should the Defendant's Application be successful, there would be no reason for the parties to argue the Plaintiff's said Application dated 18th December 2012.

3. The Grounds in support of the Defendant's Application detailed as follows:

"a) These Proceedings and more specifically those originated by the Application dated 18th December 2012 are *res judicata*.

b) The Plaintiff has deliberately concealed and/or failed, refused and neglected to fully disclose to the Court in his Pleadings of the existence of the Proceedings in Nairobi *HCCC Number 115 of 2012* (*Abdulkadir sheriff Abdikarim –vs-Ecobank Kenya Ltd*).

c) These proceedings are otherwise an abuse of the process of this Honourable Court.

d) Such other and/or further grounds and reasons as shall be adduced at the hearing hereof."

4. The Defendant's said Application was supported by the Affidavit of **Leah Mosoni Apale** sworn on 31st December 2012. The Deponent stated that she was the Legal Officer for the Defendant bank. She had read the Plaint filed herein as well as the Plaintiff's said Application dated 18th December 2012. From the Plaint, she noted that the Plaintiff averred that there had been no previous proceedings between the parties in connection with the dispute herein. She also noted that the Plaintiff, in the Supporting Affidavit to the said Application of 18 December 2012, as well as in his Witness Statement and the list and bundle of documents filed herein, had made no mention of any previous proceedings as between the parties hereto. She maintained that the statement was false, misleading and an act of perjury. She annexed to her said Affidavit a bundle of documents in relation to the proceedings filed by the Plaintiff in Nairobi *HCCC Number 115 of 2012* (originally *HCCC No. 66 of 2012*). The deponent went on to say that by a Ruling delivered by Justice Musinga on 20th April 2012, the Court in the above numbered suit had dismissed the injunction application sought therein and found *inter alia* that:

"(i) The Plaintiff had fraudulently obtained *ex-parte* orders before Mwilu J.

(ii) The Plaintiff had been lawfully and duly served with the Statutory Notice.

(iii) The Plaintiff had not shown a *prima facie* case against the Bank."

Miss Apale went on to say that the proceedings in the aforementioned case – *HCCC No.115 of 2012* were still pending before the Court and she believed that the current proceedings were merely aimed to mislead the Court into granting an *ex-parte* injunction on the eve of the suit property being sold by auction.

5. The Plaintiff responded to the Affidavit in Support of the Defendant's Application by swearing a Replying Affidavit on 31st January 2013. He maintained that he had been advised by his advocates on record that the Ruling delivered by Musinga J. on 20th April 2012 in *HCCC No. 115 of 2012* did not give the Defendant any avenue to circumvent the law in exercising its statutory power of sale. He maintained that upon the delivery of the Ruling, the Defendant ought to have issued a fresh notice in compliance with the law which it failed so to do. The Plaintiff then went on to maintain that the Defendant had attempted to sell the suit property at a gross undervalue which was not an issue for determination in the previous suit as that issue had not arisen by that time. As a result, the Plaintiff had been advised by his advocates on record that the current proceedings were not *res judicata*.
6. On the 21 March 2013, Mr. Luseno on behalf of the Defendant and Mr.Lakicha on behalf of the Plaintiff made oral submissions to the Court. Mr. Luseno put forward 3 main points for the Court's consideration. He felt that the Plaint on record should be considered by Court along with the list and bundle of documents and witness statements filed by the Plaintiff. The Court would notice that what had not been detailed in the said documents was that there existed *HCCC No. 115 of 2012*. No pleadings in relation to that suit were part of the Plaintiff's documents. In counsel's view this amounted to deliberate concealment of a material fact especially when an interim order of injunction was obtained herein *ex parte*. Mr. Luseno also invited the Court to peruse the proceedings before Lady Justice Mwilu in *ELC No. 66 of 2012*. *HCCC No. 115 of 2012* had originally been filed in the Land Division of this Court but was transferred to the Commercial Division and given a new case number. Counsel drew the attention of the Court to the Ruling of Musinga J delivered on 20 April 2012 more particularly the Judge's finding at paragraphs 12 and 13 on page 5 of the said Ruling. Counsel maintained that the learned Judge had found that a valid statutory notice had been served on the Plaintiff and that he had further found that the Plaintiff had not established a *prima facie* case. The Judge had also found that the proceedings conducted before Mwilu J. were conducted fraudulently for failing to disclose a material fact.
7. The second issue that counsel wished to emphasise, was that the Defendant had agreed to revalue the property as it still wished to exercise its statutory power of sale. Arising out of *HCCC No. 115 of 2012*, the auction sale was not conducted as injunctive Orders were obtained by the Plaintiff and these were issues dealt with in that suit. Thereafter, counsel referred the Court to the finding of **Deverell JA** in the case of **<u>Ukay Estate Ltd & Anor. v Shah Hirji Manek Ltd</u> Civil Appeal No. 243 of 2001** reported at **(2006) eKLR**. Lastly, Mr. Luseno commented that what was the key concern was that if **Gacheru J** who granted interim injunctory Orders herein had been aware of the finding of **Musinga J.** as above that the statutory notice had been issued and served, she may well not have granted such Orders.
8. In his turn, Mr.Lakicha stated that he entirely relied upon the Replying Affidavit filed by the Plaintiff on 31 January 2013. He noted that there were 8 grounds in the Plaintiff's said Application dated 18th December 2012. The Plaintiff was saying that the issues that are raised by him are not similar and arise from different facts. Counsel maintained that the only issue that **Musinga J.** decided was that of the statutory notice. Counsel observed that in the suit before the learned Judge there were two properties involved whereas in this suit, only one property was to be considered in terms of the Plaintiff seeking a restraining order as regards its sale. Counsel noted that one of the properties had already been sold based on the statutory notice which had been previously issued. He also noted that the Defendant had not disclosed to the Plaintiff how much the one property that was sold, had fetched. The Plaintiff noted that the property, which was sold, was valued at Shs.

37,000,000/- but no credit had been given by the Defendant to the Plaintiff. Without so advising, the Defendant was now proceeding to put up the other property for sale. Mr. Lakicha maintained that the Plaintiff in seeking to stop the sale of the second property in the Application dated 18th December 2012, such was brought under different circumstances.

9. In counsel's view the previous statutory notice issued by the Defendant had been spent. Counsel submitted that the Court could and should not allow the Defendant to sell the second suit property without the taking of accounts. Further, he maintained that the Plaintiff had dealt with three new facts in the Supporting Affidavit to the Application dated 18th December 2012. The final issue was whether the Plaintiff had deliberately concealed material facts. This had been referred to in the Replying Affidavit. In conclusion, counsel maintained that he relied upon the authorities of **Mwinzi v Kenya National Assurance Co. (2001) Ltd & Anor (2005) eKLR, Evelyn Macharia v Bamburi Supermarket Ltd (2006) eKLR** as well as **Mugo Ndegwa v Githae & 2 Ors (2010) eKLR**.

10. Mr. Luseno, in a brief reply, submitted that the Replying Affidavit of the Plaintiff raised no question as to the taking of accounts. The Defendant's Application raised only two grounds namely *res judicata* and abuse of the Court process. **Musinga J.** had found that statutory notices were issued in respect of each of the Plaintiff's properties. He submitted that the statutory notice in respect of the second property was still valid. On the question of material disclosure, counsel noted that the existence of the other suit was not raised in the Supporting Affidavit of the Plaintiff's said Application dated 18 December 2012. He asked the court to peruse the grounds in support of the Application by the Plaintiff which was before **Musinga J.** for consideration. He also urged the court to look at the prayers in both suits which he maintained, were the same. Certainly the prayer for injunction was raised as a substantive prayer in both suits. Further, questions of accounts had also been raised in both suits. Counsel maintained that, in the Motion before court, the Defendant was only asking for protection from being prosecuted in the other case – *HCCC No. 115 of 2012*. Finally, Mr. Luseno asked the Court to examine the Plaintiff's conduct and find that he was not worthy of the injunctive remedy sought.

11. The Court's file for *HCCC No. 115 of 2012* was availed to me. The Notice of Motion of the Plaintiff in that suit (as well as in this suit) was dated 8 February 2012. The prayers sought in that Application

> **"1. THAT this application be certified urgent in the first instance and for reasons to be recorded its service be dispensed with and it be heard exparte.**
>
> **2. THAT a temporary injunction do issue restraining the Defendants, either by themselves, jointly or any of them, their servants agents auctioneers or any of them or otherwise howsoever or any person claiming title through them from transferring/selling or in any way interfering with the Plaintiffs quiet possession enjoyment and occupation of L.R. Numbers 209/11067/7 and L.R. Number 209/11067/22 until this suit is heard and determined.**
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> **3. THAT the defendants whether by themselves either jointly or any of them, their servants, agents advocates or auctioneers or any of them howsoever be restrained by temporary injunction from doing the following acts or any of them that is to say from advertising for sale, disposing or selling by Public Auction, private treaty at any time completing by conveyance, transfer or any sale concluded by auction, private treaty, leasing, letting or otherwise howsoever interfering with the Plaintiffs occupation and ownership in those parcels of land known as L.R. Numbers 209/11067/7 and L.R. Number 209/11607/22 pending hearing determination of this suit.**
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> **4. THAT an order be made under Section 52 of the Indian Transfer of Property (Amendment) Act 1989 that during the pendency of this suit THAT ALL FURTHER REGISTRAITON or change of registration in the ownership, leasing, subleasing allotment, user or possession or in any kind of right title or interest in ALL THOSE PARCELS of land known as L.R.**

Numbers 209/11067/7 and L.R. Number 209/11067/22.

5. THAT the Plaintiff be at liberty to apply for such further or other orders and or directions as this Honourable Court may deem fit and just to grant.

6. THAT costs of and occasioned by this application be borne by the defendants".

12. As I see it, prayers nos. 1 to 3 in *HCCC No. 115 of 2012* are identical to prayers (a) to (c) in this suit apart from the fact that the other property L. R. No. 209/11067/7 has been omitted therefrom. The Plaintiff in *HCCC No. 115 of 2012* had further asked for an order under **section 52** of the *Indian Transfer of Property (Amendment) Act 1989* that all further registration of transfer documents etc. be halted at the Lands Registry. In this suit, the Plaintiff sought a declaration that the intended sale of L. R. No. 209/11067/22 was fraudulent and illegal, null and void and that his right of redemption be reinstated or be declared still alive. There was a further prayer as above seeking an order for the Defendant to furnish accounts.
13. The question for this Court is whether the further prayers sought in this suit amounted to fresh matters not adjudicated upon by **Musinga J.** in his Ruling delivered on 20 April 2012 in *HCCC No. 115 of 2012*. Counsel for the Defendant urged me to look at paragraphs 12 and 13 of that Ruling. I also consider that paragraph 14 is relevant to the Application before me, those paragraphs stated as follows:

> **"12. However, at pages 96 to 99 of the replying affidavit copies of statutory notices that were sent to both the plaintiff and the Borrower under certificate of postage are exhibited. The postal address indicated on the statutory notices is the one that is contained in the various charge documents. I therefore find and hold that the plaintiff was duly served with a valid statutory notice as required under the law.**
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> **13. It is not disputed that the Borrower is in arrears of its loan repayments to the 1st defendant. The court has established that an appropriate statutory notice was served upon the plaintiff and upon its expiry the 2nd defendant served upon the plaintiff and upon its expiry the 2nd defendant served the 45 days' notice of sale of the suit property. In the circumstances, the plaintiff has not made out a prima facie case with a likelihood of success.**
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> **14. It matters not whether the suit property is a residential house where the plaintiff and his family members have been living for may years. As long as it was properly charged to the 1st defendant and the Borrower has breached the terms of the lending and the lender has given the plaintiff as well as the Borrower appropriate notices, the Bank is perfectly entitled to exercise its statutory power of sale".**

14. As I see it, **Musinga J's** finding that the statutory notices were valid and that the Defendant was perfectly entitled to exercise its statutory power of sale covers the two prayers of the Plaintiff's said Notice of Motion dated 18 December 2012 seeking declarations that the intended sale was fraudulent or that the Defendant's statutory power of sale was fraudulent. The prayer that remains is for an order for the Defendant to furnish accounts. In the Supporting Affidavit to the Plaintiff's said Application of 18 December 2012, he goes into considerable detail as regards the sale of L. R. No. 209/11067/7, Halai Estate, Nairobi South C. This was the property disposed of under the auspices of HCCC *No. 115 of 2012*. What I am unable to understand as regards the fresh Application of the Plaintiff is why he did not seek orders in <u>that</u> suit with regard to the Defendant accounting for monies received from the sale of the said property. It is my belief that the prayer in <u>this</u> suit for the taking of accounts was merely tacked on because the Plaintiff had excluded it from *HCCC No. 115 of 2012*. What stopped the Plaintiff from including such a prayer in an application to amend the Plaint in that suit is beyond this Court. Why the necessity to bring a fresh suit?
15. The Defendant's said Application was, as detailed above, based on the plea of *res judicata* on the one hand and deliberate concealment amounting to an abuse of the process of the Court on the part

of the Plaintiff, on the other hand. On the *res judicata* point, **section 7** of the *Civil Procedure Act* provides 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 any 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. (4) under **section 7** as above reads:

> **"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."**

As per **Deverell JA** in the case of **Ukay Estate Ltd** (supra) the learned Judge stated:

> **"The key phrase in both the main section and the Explanation is 'the matter directly and substantially in issue'. It has to be borne in mind that neither the Section nor the Explanation mentions of the 'cause of action'.**
>
> **I consider that what the court hearing the subsequent suit has to decide is whether the matter directly and substantially in issue in the former suit is the same as the matter directly and substantially in issue in the subsequent suit. In cases where the cause of action is the same the task will be easier than in cases where the cause of action is different but the matter directly and substantially in issue is the same."**

It seems to me that despite the prayer for the taking of accounts in the Plaintiff's Notice of Motion dated 18 December 2012, the matters considered by **Musinga J.** in his said Ruling are matters directly and substantially in issue in this suit before Court.

16. Out of the cases/authorities cited to this Court by the Plaintiff, I received the most assistance as regards matters *res judicata*, from the Ruling of my learned brother **Musinga J.**in the case of **Kenya National Union of Teachers (Nakuru Branch) v John Kihiko & 2 Ors (2004) eKLR** as well as the finding of **Ochieng J.** in the case of **Mwinzi v Kenya National Assurance Co (2005) eKLR**. In the former case, **Musinga J.** quoted from what he termed a *locus classicus* on the issue of *res judicata* being the case of **Yat Tung Investment Co. Ltd v Dao Heng Bank Ltd (1975) AC 581** at **P. 590** as follows:

> **"Where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time".**

Similarly, **Ochieng J.** dwelt upon the case of **Kanorero River Farm Ltd & 3 Ors v National Bank of Kenya Ltd HCCC No. 699 of 2001** as per the finding of **Ringera J.** therein as follows:

> **"As I understand the law, the doctrine of *res judicata* applies to both suits and**

applications, whether they be final or interlocutory. Indeed section 2 of the Civil Procedure Act defines a suit to mean any civil proceeding commenced in any manner prescribed. And prescribed is defined as prescribed by rules. Applications for a temporary injunction are prescribed for by Order 39 of the Civil Procedure Rules. It follows that the determination of such an application by a court of competent jurisdiction would in appropriate circumstances operate as a plea in bar called *res judicata*."

Ochieng J. then quoted from the well-known Court of Appeal decision in **Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Ors** **Civil Appeal No. 36 of 1996** where it was held as follows:

> **"That is say, there must be an end to applications of similar nature; that is to say further, wider principles of *res judicata* applying to applications within the suit. If that was not the intention, we can imagine that the courts would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that section 89 of the Civil Procedure Act caters for."**

17. In my opinion, the Plaintiff's Application dated 18 December 2012 as well as this whole suit quite clearly fall under the plea in bar of *res judicata*. However, what of the second leg of the Defendant's said Application as regards abuse of the Court's process by the Plaintiff in failing to reveal the existence of *HCCC No. 115 of 2012* in its pleadings in this suit including the Affidavit in support of his Application dated 18 December 2012. To my mind, I agree with Mr. Luseno, that the Plaintiff deliberately concealed the fact that the previous case existed. The current suit before this Court would seem to be a last desperate attempt by the Plaintiff to save the suit property from being sold and which he details, in paragraph 13 of the Affidavit in support of his Application dated 18 December 2012, is a family home. In that regard I can do no better than quote from the said Ruling of my learned brother **Musinga J.** in *HCCC No. 115 of 2012*, paragraph 14 as I have detailed above.
18. The up-shot of the above is that I uphold the Defendant's Notice of Motion dated 31 December 2012. I strike out the Plaintiff's Notice of Motion dated 18 December 2012 and I dismiss this suit against the Defendant. The Defendant will have the costs of this Application as well as the suit. The Plaintiff would do well to heed the finding of the Court of Appeal in the **Uhuru Highway Development** case as above with regard to the direction detailed therein that there must be an end to interlocutory applications as much as they ought to be an end to this litigation between the parties herein including **HCCC No. 115 of 2012**.

DATED and delivered at Nairobi this 18th day of June, 2013.

J. B. HAVELOCK

JUDGE