



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 7 OF 2011

ERNEST MUNGAI KAMAU PLAINTIFF

V E R S U S

STANDARD CHARTERED BANK (K) LTD 1ST DEFENDANT

S. M. GATHOGO T/A VALLEY AUCTIONEERS 2ND DEFENDANT

RULING

1. The Plaintiff it, been disclosed by the 1st Defendant and which the Plaintiff does not deny, has a subsisting suit in Nairobi being Milimani High Civil Case No. 569 of 2007. In that case an order was made requiring the Plaintiff to deposit in Court the amount that the Plaintiff owed the 1st Defendant as condition of granting him an injunction restraining the 1st Defendant from selling the charged property namely; LR No. MSA/Block XIV/364.
2. Rather than depositing that amount as ordered by the Court the Plaintiff came to Mombasa High Court and filed this present suit. Although in filing this present suit, he did disclose the existence of the Milimani High Court suit, he however failed to state that he had obtained from that Court a conditional injunction order.
3. In this suit the Plaintiff pleaded in his plaint that the 1st Defendant had fraudulently sold his property. He prays in his plaint for a declaration that an auction conducted by the 2nd Defendant on 15th April 2011 was illegal and nullity. He also seeks a declaration that the sale of his property to the 3rd Defendant was illegal and nullity. He finally seek for a permanent injunction restraining the Defendants from interfering with his property.
4. The Plaintiff filed a Notice of Motion dated 20th April 2011 and obtained ex parte injunction order on 21st April 2011. By that order the Defendants were enjoined from interfering, wasting or alienating the property pending the hearing and determination of that application. That injunction is still subsistence todate. Instead of proceeding with the interpartes hearing of that Notice of Motion the Plaintiff abandoned the same and proceeded to file another injunction application dated 4th March 2013.
5. The Court on 21st March 2013 ordered the parties by consent to file written submissions in respect

the application 4th March 2013.

6. When the matter came before the Court on 31st July 2013, even though the Plaintiff had been served with a hearing notice for that day neither he nor his advocate attended Court. Further and more importantly the Plaintiff failed to file his written submissions in support of his said application.
7. The Motion no doubt having not been supported by submissions either orally or in writing shall be dismissed. But more importantly the Notice of Motion of 4th March 2013 is res judicata and shall therefore be dismissed. The application is similar to the one dated 20th April 2011 and to the one in Milimani Court where conditional injunction was granted. If one doubted whether an application can be found to offend the doctrine of res judicata the answer would be found in the case by the Court of Appeal UHURU HIGHWAY DEVELOPMENT LTD -VS- CENTRAL BANK OF KENYA & 2 OTHERS CIVIL APPEAL NO. 36 OF 1996 where the Court stated-

“What is before us is: can a matter of interlocutory nature decided in one suit be subject of another similar application in the same suit? Does the principle of res judicata apply to an application heard and determined in the same suit?”

... There is no doubt at all that provisions of Section 7 of our Civil Procedure Act relating to res judicata in regard to suits do apply to applications for execution of decrees but there is no doubt, also, that these provisions are governed by principles analogous to those of res judicata.

... There is not one case cited to show that an application in a suit once decided by courts of competent jurisdictions can be filed once again for a rehearing. This shows only one intention on the part of the legislature in India and our Civil Procedure Act. That is to say, there must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to applications with the suit. If that was not the intention, we can imagine that the Courts could and 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.”

8. Moreover, this suit ought to be stayed as provided by Section 6 of the Civil Procedure Act Cap 21. That Section provide as follows-

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”

This suit is similar or relates to the same subject matter to the one filed before the Milimani High Court in Nairobi.

9. In that regard, I grant the following orders-
 - a. **The Notice of Motion dated 4th March 2013 is dismissed for reasons stated above with costs to the Defendants. The interim injunction issued hereof on 21st April 2011 is hereby discharged and vacated.**
 - b. **This suit is stayed until the conclusion of the Milimani High Court Civil Suit Case No. 569 of 2007 or until further orders of the Court.**

Dated and delivered at Mombasa this 17th day of October, 2013.

MARY KASANGO

JUDGE