



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**

**Civil Suit 175 of 2011**

**EUNICE NYAKIUMBA**

**WAWERU.....PLAINTIFF**

**VERSUS**

**NIC BANK LIMITED.....1<sup>ST</sup>**  
**DEFENDANT**

**JAMES MUTURI GATURA.....2<sup>ND</sup>**  
**DEFENDANT**

**RULING**

A chronology of the actions leading to the application filed herein by the Plaintiff dated 29<sup>th</sup> August 2011 is as follows. The Plaintiff filed the suit herein against the 1<sup>st</sup> Defendant on 18<sup>th</sup> April 2011, by way of a Plaint dated 15<sup>th</sup> April 2011. The Plaintiff sought orders on delivery of statement of accounts and a settlement of her loan account with the 1<sup>st</sup> Defendant, an injunction restraining the 1<sup>st</sup> Defendant from selling by public auction or interfering with the parcel of land known as LR NO. Ngong/Ngong/18944 (hereinafter referred to as the suit property), and the discharge of a charge over the suit property made in favour of the 1<sup>st</sup> Defendant.

The Plaintiff also sought temporary injunctive orders against the 1<sup>st</sup> Defendant by an application of the same date. Temporary orders granted by this court on 19<sup>th</sup> April 2011 were overtaken by events, as the suit property was sold on the same day to the 2<sup>nd</sup> Defendant by way of public auction.

On 22<sup>nd</sup> June 2011 the 2<sup>nd</sup> Defendant filed suit and an application against the Plaintiff in Nairobi Chief Magistrate's Court in Civil Case No. 2235 of 2011, and in both pleadings sought orders that the Plaintiff's continued occupation of the suit property was unlawful and a trespass, and an eviction order as against the Plaintiff. This action was brought on account of the 2<sup>nd</sup> Defendant having been registered as proprietor of the suit property. The prayers sought in the application were granted in a ruling given by Hon. Mr. Kiema on 7<sup>th</sup> July 2011, and is what precipitated the subject application herein. The 2<sup>nd</sup> Defendant's pleadings in relation to Chief Magistrate's Court Civil Case No. 2235 of 2011 are annexed to the affidavit sworn by Mr. Edward Aboki Begi on 29<sup>th</sup> August 2011, in support of the application that the Plaintiff's substantive subject application be heard during the court vacation.

In the meantime, on 16<sup>th</sup> August 2011 the Plaintiff had filed an application in Nairobi Chief Magistrate's Court Civil Case No. 2235 of 2011 to set aside the orders given on 7<sup>th</sup> July 2011. On 26<sup>th</sup> August 2011 the Plaintiff also filed a Defence and Counterclaim dated 16<sup>th</sup> August 2011 in Nairobi Chief Magistrate's Court in Civil Case No. 2235 of 2011. In that Counterclaim the Plaintiff seeks orders against both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the suit herein, and three other Defendants, including an order for an injunction restraining the 2<sup>nd</sup> Defendant from alienating the suit property. The pleadings in respect of the Plaintiff's said application, Defence and Counterclaim are annexed to the Replying Affidavit sworn by the 2<sup>nd</sup> Defendant on 28<sup>th</sup> September 2011. On 22<sup>nd</sup> August 2011 the Plaintiff then proceeds to amend the Plaintiff in the suit filed herein to join the 2<sup>nd</sup> Defendant, which said Amended Plaintiff was filed on 23<sup>rd</sup> August 2011.

We now come to the Plaintiff's subject application dated 29<sup>th</sup> August 2011 which is seeking injunctive orders against the Defendants restraining them from trespassing, evicting and/or in any way interfering with the Plaintiff's quiet and peaceful enjoyment of the suit property pending the hearing and final determination of the suit filed herein, and that the Officer Commanding Ngong Police Station do assist in the enforcement of this order.

The grounds for the Plaintiff's application are that the Plaintiff is in occupation of the suit property which has been transferred to the 2<sup>nd</sup> Defendant through purchase by an auction which is the subject of litigation in this suit. Further that the plaintiff stands to suffer substantial loss and irreparable damage unless an order of injunction is issued in her favour pending the hearing of this suit as she will be exposed to eviction arising from the orders given in Nairobi Chief Magistrate's Court Civil Case No. 2235 of 2011

I have explained the history of this application in great detail in light of the contention by the 2<sup>nd</sup> Defendant's in the Grounds of Opposition dated 26<sup>th</sup> September 2011 and submissions dated 15<sup>th</sup> November 2011, that this court has no jurisdiction to give the orders sought in the subject application. The 2<sup>nd</sup> Defendant submits that the court lacks jurisdiction under sections 6 and 7 of the Civil Procedure Act (Cap 21), as the matter in issue in this application and suit is directly and substantially in issue and pending in Nairobi Chief Magistrate's Court Civil Case No. 2235 of 2011, and that a similar application in which the Plaintiff applied for setting aside of the order of eviction and an order of injunction in the Nairobi Chief Magistrate's Court Civil Case No. 2235 of 2011 was heard and dismissed by the said court. The 2<sup>nd</sup> Defendant has annexed evidence of the pleadings and application in Nairobi Chief Magistrate's Court Civil Case No. 2235 to his Replying Affidavit sworn on 28<sup>th</sup> September 2011, but has not annexed evidence of the said dismissal.

The Plaintiff's Counsel in further written submissions dated 1<sup>st</sup> December 2011 addressed this point of law, and submitted that the suit herein was filed on 17<sup>th</sup> April 2011 before the Nairobi Chief Magistrate's Court Civil Case No. 2235 of 2011 which was filed on 24<sup>th</sup> June 2011, and is therefore an earlier suit. Further that the two suits are not the same as the one in the subordinate court only involved the Plaintiff and 2<sup>nd</sup> Defendant, and is only seeking orders as to eviction, while the suit filed herein also seeks a declaration that the auction sale be nullified. Finally, Counsel submits that the Nairobi Chief Magistrate's Court Civil Case No. 2235 of 2011 has since been struck out as it was found that the subordinate court had no jurisdiction to entertain the same. The Plaintiff did not provide any evidence of an order striking out Nairobi Chief Magistrate's Court Civil Case No. 2235 of 2011 for want of jurisdiction, as alleged.

I have to decide the preliminary issue of jurisdiction first, as it will determine if I will proceed with the other issues raised in the application. On this issue I do agree with the Plaintiff's submissions that the defence of *res judicata* provided for in section 7 of the Civil Procedure Act cannot lie. This is principally because the main issue in this application, which is that of the continued occupation of the Plaintiff in the suit property, has not been finally determined in Nairobi Chief Magistrate's Court Civil Case No. 2235 of 2011. In addition the suit in the subordinate court only involved the Plaintiff and the 2<sup>nd</sup> Defendant. Section 6 of the Civil Procedure Act is also not applicable as the parties and issues in the two suits are different.

That notwithstanding, I do find that the subject application is an abuse of the process of court for various reasons. Firstly, the 2<sup>nd</sup> Defendant was joined in the Amended Plaintiff filed herein, and the application brought against him by the Plaintiff, while a similiar application and suit in the Nairobi Chief Magistrate's Court Civil Case No. 2235 of 2011 was still subsisting between the parties. Contrary to the Plaintiff's assertion that in the circumstances the suit filed herein is the earlier one, I refer to the decision of Trainor J. in **Atieno v Omoro, (1985) KLR 677**, where it was held that where an amendment has the effect of adding a new party, that new party should not be prejudiced, and any defence available to the added party will be open to him as if the proceedings had been first instituted at the time of amendment. In such instances the amendment will not have a retroactive effect to the date the original pleading was filed.

Secondly, the 1<sup>st</sup> Defendant in the subject application was not a party to the suit in the subordinate court that gave rise to the application. Finally, no disclosure is made by the Plaintiff in the subject application or in the Amended Plaintiff of the Counterclaim against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in Nairobi Chief Magistrate's Court in Civil Case No. 2235 of 2011.

The injunction sought in the Plaintiff's application dated 29<sup>th</sup> August 2011 is therefore denied for the reasons given in the foregoing. This Court will instead give directions in exercise of its inherent power conferred by section 3A of the Civil Procedure Act, and in furtherance of the overriding objective of facilitating just, expeditious, proportionate and affordable resolution of disputes under section 1A and 1B of the said Act. I hereby accordingly order that the file in Nairobi Chief Magistrate's Court Civil Case No. 2235 of 2011 be transferred forthwith to the High Court for perusal with a view to consolidation, hearing and determination together with the suit filed herein. The *status quo* in the meantime shall be that the Plaintiff will continue to be in occupation of the suit property, namely, LR NO. Ngong/Ngong/18944 until further orders are given by this Court, and that the Plaintiff shall not in any way or manner interfere with the 2<sup>nd</sup> Defendant's title to the said suit property.

The Plaintiff shall meet the costs of the application dated 29<sup>th</sup> August 2011.

Dated, signed and delivered in open court at Nairobi this 31<sup>st</sup> day of January, 2012.

**P. NYAMWEYA**

**JUDGE**