



REPUBLIC OF KENYA

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

Civil Case 27 of 2012

AGNES NDINDA MALUNDU..... PLAINTIFF

VS

FAMILY BANK LIMITED..... DEFENDANT

RULING

1. By a Notice of Motion application dated 12th January 2012, the Plaintiff applied to this court for orders of interlocutory injunction restraining the Defendant from exercising its statutory power of sale, foreclosing, disposing of or otherwise interfering with the Plaintiff's ownership and quiet possession of her property known as L.R. No. Nairobi/Block 111/601 situate in Komarock area of Nairobi (hereinafter called the suit property).
2. The application was based on grounds set out on the face of the affidavit and which essentially challenged the validity of the charge and further indicated that the Defendant's statutory power of sale had not arisen. These grounds were buttressed by a supporting affidavit sworn by the Plaintiff on 12th January 2012.
3. By grounds of opposition dated 16th February 2012, the Defendant opposed the application mainly on the ground that the suit filed by the Plaintiff was *res judicata*, a similar suit being HCCC No. 381 of 2010 involving the same facts and the same parties having been dismissed by this court (Okwengu J) through a ruling delivered on 11th March 2011.
4. When Notice of Motion application came up for *inter partes* hearing on 20th February 2012, the parties agreed to dispose of the question of whether or not the present suit was *res judicata* in view of HCCC No. 381 of 2010. Parties further agreed to put in written submissions addressing this preliminary point.
5. The issue that I now need to determine is whether the present suit is *res judicata* in view of the previous suits involving the same parties.
6. From the pleadings and the affidavit evidence placed before me, the genesis of HCCC No. 381 of 2010 can be traced to a suit filed by the Plaintiff against the Defendant in the Chief Magistrates Court being CMCC NO. 7962 of 2006. The subject matter of this suit was a post-employment claim by the Plaintiff against her former employer the Defendant in which the Plaintiff was employment claim lodged by the Plaintiff following termination of her employment with the Plaintiff. The orders sought in the suit were

for a permanent injunction to issue against the Defendant restraining it from selling the Plaintiff's Motor vehicle held as security for car loan and school fees facility. The Plaintiff's case was dismissed on 15th October 2009 whereupon the Plaintiff filed an appeal being Nairobi Civil Appeal No. 596 of 2009. The appeal was heard and a ruling delivered on 2nd February 2010 in which the Plaintiff was granted an interlocutory injunction on conditions that she would deposit a sum of Kshs. 500,000/- in a joint account held by advocates for the parties. This ruling was subsequently compromised through a consent filed in court on 15th March 2010 in which the Plaintiff agreed to settle the outstanding loan then agreed at Kshs. 569,953/- plus costs in the sum of Kshs. 127,000/- in monthly installments. Upon settlement of the debt sum, the Defendant agreed to release the Title Deed to the suit property and the logbook to the motor vehicle held as security.

7. On 2nd June 2010, the Plaintiff filed a fresh suit being ELC No. 268 of 2010 in which she sought an order for the discharge of the suit property on the grounds that she had offered the title to be held in simple deposit to secure a school loan facility and had never caused it to be charged to the Defendant. Having paid the school fees facility in full, the Plaintiff sought discharge of the property. This suit was then transferred to Milimani Commercial Court for hearing and determination and allocated HCCC NO. 381 of 2010. In a ruling delivered on 11th March 2011, Okwengu J dismissed the suit on grounds that it was res judicata in view of Civil Appeal No. 596 of 2009 as well as CMCC No. 7962 of 2006.

8. I have juxtaposed the subject matter of the present suit against the previous proceedings analyzed above. My analysis of the cases filed by the Plaintiff is that CMCC No. 7962 of 2006 essentially sought to restrain the Defendant from disposing the Plaintiff' Motor Vehicle KAQ 494H. It never touched on the suit property at all. Civil Appeal No. 596 of 2009 was an appeal against the decision in CMCC No. 7962 of 2006 and therefore could not have involved the suit property as part of its subject matter. This is evident from the ruling of Okwengu J of 2nd February 2010 where the learned judge observed as follows at paragraph 8 of the ruling:

“Property known as L.R. No. 111/601 not having been the subject of the suit in the lower court cannot be subject of the orders of stay pending appeal as no arguable appeal can arise in respect of that property. In the circumstances, the Applicant's prayer for interlocutory and mandatory injunction in respect of property known as L.R. No. 111/601 is misconceived”.

9. The above orders therefore make it clear that up to Civil Appeal No. 596 of 2009, the suit property was not the subject matter of the proceedings between the parties.

10. Turning to HCCC No. ELC 268 of 2010 which later changed to HCCC No. 381 of 2010 upon transfer to the Commercial Court, the prayers sought in that suit were for discharge of the property on the grounds that no valid charge existed and that the loan in respect of which title was held in simple deposit had been cleared. This suit was however never heard on its merits as it was dismissed on the grounds that it was *res judicata* the previous proceedings that is HCCC No. 596 of 2009 and HCCC NO. 7962 of 2006. However, having shown that these previous proceedings did not relate to the suit property at all, it has to follow that HCCC No. 381 of 2010 was not indeed res judicata. That suit ought to have been allowed to be heard on its merits as the question of whether or not the property was to be discharged had never been canvassed before.

11. The Plaint in the present suit that is HCCC No. 27 of 2012 seeks prayers restraining the Defendant from exercising its statutory powers of sale, selling or otherwise interfering with ownership of the suit property. The Plaintiff also seeks a declaration that the charge document held by the Defendant is unlawful and irregular. She further seeks an order for discharge of the title. Although the prayers seeking nullification of the charge and the discharge of the property were the subject matter of HCCC No. 381 of 2010, these prayers were never canvassed and determined by the court as to constitute res judicata in the present suit. Similarly, the prayer seeking to restrain the Defendant from selling the suit property is completely novel and has never featured in the previous suits. In the circumstances, I am satisfied that the present suit does not constitute the same subject matter as the previous proceedings in this matter.

12. For these reasons, the Defendant's preliminary objection fails and is hereby dismissed with no orders as to costs. The parties may fix the Notice of Motion dated 12th January 2012 for hearing within 14 days from today.

IT IS SO ORDERED.

DATED, SIGNED and DELIVERED in Nairobi this 24th day of May 2012.

J. M. MUTAVA

JUDGE