



JOSEPHINE NJOKI MWANGI (*Suing as the Legal/Personal representative of the estate of the late*

JOSEPH KIRAGU

MURAGURI).....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY (K)

LTD.....DEFENDANT

RULING

1. In an application dated 27th September 2010, the plaintiff sought the following order, “*That pending the hearing and determination of the suit herein, an interlocutory injunction do issue to restrain the defendant either by itself, its agents and or servants from selling, transferring, alienating, or otherwise howsoever interfering with the plaintiff’s possession of LR No. Nairobi/Block III/16, Komarock Estate, Nairobi.*”

2. The application was duly argued inter-parties and by a ruling dated 2nd July 2012, Hon. Mr. Justice Musunga held as follows, “[32]*In view of the foregoing, I am satisfied that the plaintiff has established a prima facie case with a likelihood of success. [33]As regards the issue irreparable loss it has repeatedly been held that once a property has been mortgaged and there is default in payment it becomes a chattel for sale like any other and the borrower cannot therefore argue that he stands to suffer irreparable loss. See Lawrence Muthiani Maithya v Housing finance Kenya Ltd [2003] 1 E.A 133. [34] For these reasons, I find and hold that the plaintiff’s application is wanting in merits since the plaintiff has not established that she has a prima facie case with a likelihood of success and that she stands to suffer irreparable loss unless the orders sought are granted. Consequently, I dismiss the same with costs to the defendant.*”

3. On 2nd July 2012, after delivery of the ruling, counsel for the plaintiff applied for a temporary injunction pending the filing of a formal application. Justice Musunga granted an order on the following terms, “*There will be a temporary injunction to restrain the defendant from selling the suit property for a period of 21 days from today pending the filing of a formal application.*”

4. That plaintiff has now moved the court by the Notice of Motion dated 22nd August 2012 for the following order:

(3) *That pending the hearing and determination of the suit herein, an interlocutory injunction order do issue to restrain the defendant either by itself, its agents and or servants from selling, transferring, alienating or otherwise howsoever interfering with the plaintiffs possession of LR No. NAIROBI/BLOCK 111/16, KOMA ROCK ESTATE, NAIROBI.*

5. The application is supported by the affidavit of Josephine Njoki Mwangi sworn on 22nd August 2012. Apart from alleging that she has a prima facie case with a probability of success, the plaintiff avers that on or about 7th August 2012, the defendant advertised the suit property for sale on 30th August

2012. It is contended that the advertisement is incompetent as it was done without service of the mandatory 45 days notification of sale required by **Rule 15(d) of the Auctioneers Rules, 1997**.

6. Mr K. Mbobu, who appeared together with Ms Kamende, for the plaintiff argued that service of the 45 day notice was a mandatory requirement and that the plaintiff was entitled to the fullest protection of the law and opportunity to redeem the property. He argued that the matter was not *res judicata* as the issue of notification arose after the ruling by Justice Musinga was delivered. It was thus a new matter which the court should take cognisance.

7. Counsel for the plaintiff further contended that the notification of sale, which was issued was premised on an earlier statutory notice which had been issued and which Hon. Lady Justice J. Lesiit had nullified. That suit, **HCCC No. 427 of 2008** between the same parties was eventually dismissed for want of prosecution.

8. The application was opposed on two broad grounds. Firstly, that the matter was *res-judicata* and abuse of the court process. Secondly, there was no requirement to issue a fresh notification of sale, one having been issued way back in May 2008.

9. Mr Onguto, counsel for the defendant, submitted that any dispute regarding the notification of sale ought to have been raised when the application for injunction was argued. The applicant had the opportunity to raise the issue by exercising due diligence and it was now debarred from re-litigating it. Counsel relied on the case of **Mary Wanjiru Chege v K-Rep Bank Limited Nakuru HCC 371 of 2008 (Unreported)**.

10. Counsel further submitted that a notification having been issued in May 2008, there was no need to issue a fresh notification. Counsel contended that the issue was settled in the case of **Joseph Kiarie Mbugua & Another v Garam Investments Milimani HCCC 444 of 2005 (Unreported)** where the court held that there is no requirement to serve a fresh notification of sale in the event sale is stopped or suspended.

11. I have considered the rival submissions by the parties as well as the authorities cited and I am inclined to agree with the defendant's counsel that this application is *res-judicata*. The same orders are sought in the earlier application and the present application. It is now established that a party must bring forward his/her entire case hence the enactment of **section 7 of the Civil Procedure Act**. The courts are prohibited from entertaining any suit or issue in which the matter was directly and substantially in issue in a former suit involving the same parties in a court of competent jurisdiction. This principle applies with full force to applications. (See **Yat Tung Investment v Deo Heng Bank (1975) AC 581, Mburu Kinyua v Gichini Tuti (1978) KLR 69-82.**)

12. The issue of the sale of the property was the matter in issue before Hon. Justice Musinga. The plaintiff was duty bound to bring all the issues including whether a notification of sale had been issued for determination and once the court had concluded that the proposed sale which was being impugned was proper and that there was no prima facie case with a probability of success, the plaintiff cannot be allowed to re-open the issue.

13. I am of the firm view as that of Justice R. Kuloba in his book, **Judicial Hints on Civil Procedure, 1984 (Vol 1)** at page 46 in a paragraph headed, **"Guard against attempts to evade the doctrine [of res-judicata]"** where he states that, **"One of the greatest difficulties which face those courts which try land suits is the disposition of the disappointed litigant to dress up a suit which has failed in a new guise and to try his luck once more Once a man has had his say, has taken his case as far as the law permits him, and has failed, he must be stopped from re-litigating the same matter."**

14. Even if I were wrong on the issue of *res judicata* on the basis that the notification of sale was a matter that arose subsequent to the ruling, I must hold that the application is an abuse of the court process for two reasons. First, permitting the plaintiff to litigate the issue of the notification of sale would be a collateral attack on the decision of Hon. Justice Musinga who has already held that the plaintiff has no

prima facie case. If I acceded to the plaintiff's request I would have to allow the same order which was rejected by Hon. Justice Musinga.

15. Secondly, the plaintiff was given a 21 day window to file an application for injunction pending appeal on 2nd July 2012. The plaintiff was given an interim order but failed to file the application within the time limited by the court order. The consequence of the lapse of the interim relief was that the defendant would exercise its statutory power of sale. Permitting this application outside the time limited for filing particularly where no reason has been proffered would be to encourage evasion of court orders.

16. Having come to the conclusions I have reached, it is unnecessary for me to consider the legal effect of the failure to serve the notification of sale as it must now be clear that the application is an abuse of the court process. Consequently, the Notice of Motion dated 22nd August 2012 is dismissed with costs to the defendant.

DATED and DELIVERED at NAIROBI this 29th day of August 2012

D. S. MAJANJA
JUDGE

Mr K. Mbobu with him Ms Kamende instructed by Kyalo and Associates Advocates for the plaintiff.

Mr L. Onguto instructed by J. Louis Onguto Advocates for the defendant.