REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 371 of 2008

MARY WANJIRU CHEGE.....PLAINTIFF
VERSUS
K-REP BANK LIMITED.....RESPONDENT
RULING

The applicant brought this suit simultaneously with chamber summons dated 4th December, 2008. She sought in the aforesaid summons orders of injunction to restrain the respondent from foreclosing property No.NAKURU MUNICIPALITY BLOCK 23/48 and also from selling or interfering with the same pending the hearing *inter partes* of the application.

The application was heard *inter partes* and dismissed on 14th May, 2009. In dismissing the application Koome, J noted that the same did not disclose a *prima facie* case with a probability of success at the trial for the reason that the charge documents and the statutory notice were not annexed to the application, hence the court could not decide one way or the other, whether or not the charge documents were illegal or the statutory notice was defective.

Following the dismissal of that application, the applicant has once again sought in the instant application injunctive orders in the terms similar to the earlier application. But this time the application is premised on the grounds that the threatened foreclosure is illegal, irregular and unprocedural; that the respondent is in custody of all charge documents which the applicant has no access to, hence the prayer in this application for an order to compel the respondent to produce the guarantee and the charge documents in respect of the suit property; that the instruments of guarantee were invalid and the money owed cannot be recovered by way of a foreclosure; that the documents were prepared by the respondent contrary to the Advocates Act.

In reply, the respondent, through its Manager, has averred that the application is *res judicata* the one dismissed by Koome, J; that statutory notice was duly served as required by law. The respondent has further averred that it has been approached by the applicant to convert the overdraft in question to a term loan. The respondent has denied obstructing the applicant from accessing the charge documents.

I have considered the submissions as well as authorities cited. The conditions for the grant of an interlocutory injunction are well known. The applicant's case is three-pronged. First, it is contended that she was not personally served as required by Rule 15(b) of the Auctioneers Rules. Secondly, that the notice allegedly served did not comply with the fourty five (45) days prescribed and finally that the charge was invalid.

The respondent's argument is that these are issues that were determined by the court (Koome, J) and further that personal service is not mandatory while the notice was served well within the prescribed period.
Without going into the merits of the application, it is clear to me that the grounds in the plaint, as well as those in the dismissed application did not raise the grounds being advanced in this application. In both the plaint and the dismissed application, the applicant relied on the grounds that due to the post election violence, the deaths of her son and her mother in law, she has not been able to service the overdraft.

The issue of statutory notice being defective and the charge documents being in possession of the respondent, although not pleaded were raised orally before Koome, J who found that in the absence of the documents, she could not restrain the respondents. It is settled that a party must bring forward his/her entire case, as piecemeal litigation is costly, 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 directly and substantially in issue in a former suit involving the same parties in a court of competent jurisdiction. The Privy Council once stated the law on *res judicate* in the following words in the case of Yat Tung Investment Vs. Deo Heng Bank (1975) AL 581:

"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 the 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."
I need not add anything to that clear exposition of the law which has been followed in a long line of cases in this contrary, some of which I was referred to in this matter. See Mburu Kinyua Vs. Gachini Tuti (1978) KLR 69-82 and Republic Vs. Minister for Home Affairs & 2 Others *ex parte Sitamze* H.C.C.Misc. case No.1652 of 2004. In the dismissed application, the applicant had a perfect forum to ventilate her entire case. She cannot be permitted to do so piecemeal in this application. As a matter of fact, the applicant filed a notice to appeal against the ruling of Koome, J. Nothing is being said about
that. The indebtedness is not denied. The applicant has attributed in the plaint her inability to service the overdraft regularly due to the post election violence and deaths of close relatives. The question one would want to ask is – at what stage did it occur to the applicant that the statutory notice was defective or that she was not served within the statutory notice, or that the Advocates Act was violated?

I am inclined to conclude that the applicant has failed to convince me that her application discloses a *prima facie* case with a probability of success. The suit property can be valued and the respondent being a bank is capable of compensating the applicant.

The sum owed continues to grow through accrued interest to the detriment of the respondent. The balance of convenience is in

favour of the respondent.

For the reasons stated the application dated 6th January, 2010 is dismissed with costs.

Dated, Signed and Delivered at Nakuru this 5th day of February, 2010.

W. OUKO
JUDGE