



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 127 of 2009

ABDI HASHI DUALEPLAINTIFF

VERSUS

NATIONAL BANK OF KENYA

ONESMUS WAITHAKA

JOEL K. BETTDEFENDANTS

R U L I N G

The Preliminary Objection raised is grounded on the three points of law.

- 1. That the parcel of land Narok Township/32 has already been sold and transferred to the 3rd defendant and title deed issued to him. The equity of redemption is extinguished and suit does not lie.***
- 2. That the suit herein is res judicata.***
- 3. That the suit is an abuse of court process.***

The first point to be argued in the Preliminary Objection is that the suit is res judicata. It is submitted that there was consent entered in **HCC No.239/04** settling this matter finally. It was agreed that the plaintiff would give vacant possession. In **HCC No.1944 of 2000** consent was recorded that the plaintiff was to deposit Kshs.800,000/= in default sale to proceed.

The property was sold. These circumstances were not disclosed when ex parte orders were sought. A perusal of the pleadings and documents on record do confirm this submission.

In **Nakuru HCC No.97 of 2003 – National Bank of Kenya vs. Abdi Hashi Duale**, the appeal is still pending in Nakuru High Court.

The plaintiff's suit and interlocutory application was struck out. In light of the aforesaid, the plaintiff's suit herein seeking the similar orders over the same property, is res judicata, sub judice and an abuse of the court process. Also in **Nakuru HCC 239/2004** suit between the same parties the plaintiff suit and statutory suit were struck out.

It is cited in **HCC No.262 of 2005 – Madara Evans Okanga Dondo vs. HFCK (Ltd.)** – in this case

the court at Nakuru (Kimaru, J.), commented at length regarding the plaintiff's averment "there has been no previous proceedings or any proceedings pending between the plaintiff and the defendant over this matter".

The court at page 4 of that judgment commenting on **Uhuru Highway Development Ltd. vs. Central Bank of Kenya & 2 others**, the Court of Appeal decision had opportunity to comment on a similar situation where a litigant failed to disclose material facts to the court

"once the learned Judge was satisfied as he was, that the applicant had obtained the order by concealing other relevant material, he was entitled not to consider the applicant's application any further for the courts must be able to protect themselves from parties who are prepared to deceive, whatever their motive for doing so may be, and whatever the merits of the case may be. A man who is prepared to deceive a court in granting him an order cannot validly claim that he has a meritorious case and would have been entitled to the order anyway. If the case is meritorious, there can be no reason for concealing some of them from court".

In this case, it is clear the plaintiff/applicant, although he admits that he borrowed Kshs.1 million from the defendant and that the sale of his property was fraudulent. It is clear the equity of redemption had already been extinguished when the defendant entered into a contract of sale with buyer (3rd defendant). This suit is also res judicata because this is not the first time the plaintiff has come before the court to seek similar orders and he himself has consented to final orders being made in this suit against him.

When he brought the matter to this court, he did not disclose full information to court and he is guilty of non-disclosure. In the circumstances, the application is dismissed with costs to the respondents.

It is so ordered.

DATED and DELIVERED at Nairobi this 18th day of May 2009.

JOYCE N. KHAMINWA

JUDGE